No.

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT.

ROBERT M. BETTS, Receiver of the Cornucopia Mines Company of Oregon,
Plaintiff in Error.

vs.

JOHN L. BISHER, Jr., by JOHN L. BISHER, his Guardian,
Defendant in Error.

Brief on Behalf of Plaintiff in Error.

EMMETT CALLAHAN,
SMITH & LITTLEFIELD,
Attorneys for Plaintiff in Error.

BOOTH& RICHARDSON,
Attorneys for Defendant in Error.

STATEMENT OF THE CASE.

This is an action for damages by John L. Bisher, Jr., by John L. Bisher, as guardian ad litem, to recover for injuries alleged to have been sustained by complainant while employed by appellant, Robert M. Betts, as Receiver of Cornucopia Mines Company of Oregon, on July 29, 1911, which injuries it is alleged were due to the negligence of appellant. Among other things, it is asserted that appellant was engaged in operating mines in connection with which a certain electrical plant for generating and transmitting electricity for use therein was operated; which electricity was transmitted over three copper wires from the generating plant to the mines, and that these wires were stretched upon poles about twenty feet from the ground; and that upon the same poles was a certain telephone wire located about seven feet below the electric wires.

The grounds upon which recovery is sought are, That the appellant:

1st. Failed to insulate the transmission wires at the poles and arms upon which they were tied.

2nd. Was negligent in not leaving sufficient space between the wires so that a workman could safely work between them or between the poles and wires.

3rd. Placed a dead wire with the live wires in placing the telephone wire below the live copper wires.

4th. Failed to designate the arms and poles upon which live wires were located, by colors so they might be known and observed by complainant.

5th. Failed to use due care and precaution toward complainant and other employees and failed to supply them with proper tools and implements and to give them proper instructions and directions while working about said wires.

6th. Directed respondent (complainant) to do and perform his work in an unsafe and dangerous place while respondent was ignorant of the danger, and without instructing him thereof.

7th. Directed respondent to climb and work upon poles without furnishing him with a ladder or proper appliances for the performance of such work.

8th. Failed to turn off the live electrical current while the work of putting on new insulators on crosspieces was being done on the poles.

The appellant in his answer denies:

1st. That Bisher was employed by him, as receiver, but avers that Bisher was employed by Betts, as lessee of the said mines and electric power and generating plant, and that Betts, as such lessee, was operating the mines and plant at all times when Bisher was working for him, and that Bisher had full knowledge that he was so employed by Betts, as lessee, and not as receiver.

Appellant affirmatively alleges that Bisher was employed by Betts, as lessee, to carry tools; that his

employment required him only to carry tools and supplies along the ground and did not require him to climb poles or assist in adjusting any instrumentalities upon the poles or cross-pieces; that the wire and supplies which Bisher was to carry along the ground were used by a lineman in rehabilitating the transmission lines; that appellant used every reasonable care and precaution in the construction of such line and providing for the care and safety of his employees engaged therein.

That Bisher had no work or duties to perform upon the poles in constructing and tying the copper wires to the insulators or in adjusting the insulators on the pegs; that when Bisher ascended the said poles, as alleged in the complaint, he voluntarily did so, and such act was outside and beyond his scope of employment and instructions; that his employment required him to work upon the ground in carrying wires, etc.; that he was not to do or perform any work in or about the electrical wires, or to ascend any poles, or to work about or in the vicinity of any wires whatsoever except the disconnected tie wires which he carried over the ground, and that his employment did not require him to go into any unsafe or dangerous place; that he was a volunteer.

That in climbing the poles and working among live wires, the respondent was pursuing objects and purposes of his own in trying to learn the electrical business, and knew that the current was on the wires and knew the dangers of working among them, and assumed the risk of such voluntary work.

As a further defense, the appellant alleges that the act or statute of the Oregon law upon which respondent based his right to recover damages, which act was adopted by the initiative vote of the people of the State of Oregon, is unconstitutional, in this: That it deprives the master of the defense of contributory negligence.

At the trial, evidence was adduced by the respective parties, and during the progress thereof various exceptions were taken which are specified in the transcript and which are now stated in the following.

SPECIFICATIONS OF ERRORS.

The following are the specifications of errors relied upon by plaintiff in error and which are intended to be urged by him upon the writ of error as grounds for reversal of said judgment in the District Court herein. This specification of errors is the same as the assignment of errors. (Transcript of Record, pages 374 to 392 inclusive.)

(Title)

Now comes the defendant Robert M. Betts, Receiver of the Cornucopia Mines Company of Oregon, a corporation, and in connection with his Petition for a Write of Error in the above entitled action, says that there was error on the part of the District Court of the United States for the District of Oregon in regard to the matters and things hereinafter set forth, and defendant makes this, his

ASSIGNMENTS OF ERRORS

I.

During the trial of said action, John L. Bisher, Jr., was called as a witness in his own behalf and was asked the following questions:

Q. Did they furnish you with any tools?

A. Well, Mr. Harbert, Harry Harbert, gave me a pair of climbers and a belt, and a pair of pliers.

Q. The pliers, did they have insulated handles?

A. No, sir. The pair of pliers that he gave me, they were dull, and the climbers were dull, and I sent down home and got a pair that I had used in climbing telephone poles, they were sharp, and the pliers, and the belt—I wore the belt that he gave me. And the pliers I sent down home and got a pair of pliers, because those that he gave me were old, and I couldn't use them, and they were so large I couldn't hardly use them.

Q. Did you try to use the climbers that he gave you?

A. I climbed one pole with them.

Q. Why couldn't you use them?

A. They were too dull. You cannot use climbers when they are very dull. You might slip. I climbed the pole right in front of the store when we was putting the lights in the saloon.

Mr. SMITH: We move to strike out all this testimony about the climbers and the belt and the pliers, for the reason that there is no risk alleged to have

been occasioned by them at all. It simply encumbers the record.

COURT: I understand they allege that he was not supplied with the proper utensils.

Mr. RICHARDSON: That is it, your Honor.

Mr. SMITH: But, if your Honor please, there is no charge he was hurt by reason of it. His charge is he was hurt by electric shock. He doesn't claim that they had anything to do with the shock.

COURT: I will overrule the objection.

Mr. SMITH: Note an exception.

That the Court erred in not granting defendant's motion to strike out all of the foregoing testimony.

II.

During the trial of said action, Albert Smith was called as a witness in behalf of the plaintiff, and was asked the following questions:

Q. Did you hear any one give Johnnie Bisher any orders?

A. Yes, sir.

Q. On that day?

A. I heard Mr. Ed Mills tell Johnnie Bisher that What's his name?

Q. Buxton?

A. Mr. Buxton—to go down, that he wanted him on the line.

Mr. SMITH: How was that, now? State that again.

Q. Just repeat that loud enough so we can hear it.

A. Mr. Mills, Ed Mills —

Q. Who was Ed Mills?

A. Well, he was the man that I was working under—the boss.

Q. Working under?

A. Yes, he was the boss. He was the boss at that time, that I was working under.

Q. What did he say?

A. He told Johnnie Bisher that Mr. Buxton wanted him down on the line?

Q. On what line?

A. On the electric line.

Q. Who was Mr. Buxton?

A. Well, he was the man at the powerhouse. I don't know him—don't know the man at all.

Mr. SMITH: We move to strike out the evidence as incompetent, irrelevant and immaterial.

COURT: I will overrule the motion.

Exception allowed.

Excused.

The objection was overruled by the Court, and the defendant then and there excepted thereto, and said exception was duly allowed by the Court.

That the Court erred in allowing said witness to answer said questions.

III.

During the trial of said action, L. W. Sloper was

called as a witness in behalf of plaintiff, and was asked the following questions:

Q. I will ask you, Mr. Sloper, if a three-phase transmission line, such as has been described by the witnesses in this case that you have heard, consisting of copper wires a little larger than a lead pencil, strung upon poles about 25 feet from the ground and on a support known as a cross-arm, such as the one in evidence here, said transmission lines being the distance as you observe between these two insulators on this "Exhibit B-1" of both plaintiff and defendant, the cross-arm being nailed to a post about eight inches in diameter, and the third wire being placed on an insulator on this end of the cross-arm, would it be, in your opinion, safe for a repair man or any one else to make repairs, or to change these insulators, on uninsulated wires carrying a voltage of electricity as high as 2300 volts? State whether or not,in your opinion, a workman or repair man, without the use of rubber gloves, without the use of insulated handles or pliers, or any other lineman protectors, could make those changes without endangering themselves to great injury and shock by electricity?

Mr. SMITH: Objected to as invading the province of the jury, and as incompetent.

COURT: You might qualify him as an expert.

Mr. RICHARDSON: He is qualifying as an expert lineman.

COURT: Very well. I will overrule the objection.

Defendant objected to this question as invading the province of the jury and as being incompetent. The objection was overruled by the Court, and the defendant then and there excepted thereto, and said exception was duly allowed by the Court.

That the Court erred in allowing said witness to answer said question.

IV.

During the trial of said action, L. H. Kennedy was called as a witness on behalf of the plaintiff and was asked the following questions:

Q. What is the custom of the average employer of requiring linemen to use rubber gloves?

Mr. SMITH: Objected to, as the custom is not pleaded in this case, or relied on. He cannot rely upon the statute and custom at the same time. If he wants to amend his complaint and rely on custom, he can do so.

Mr. RICHARDSON: It is not a question of relying on custom, if they failed to use the safety device, any safety device, for the purpose of protecting their employes.

COURT: I will overrule the objection. You may proceed.

Defendant objected to this question as the custom is not pleaded in this case or relied upon, and that such questions do not tend to prove any issue in this case and were not proper questions to propound to the witness. The objection was overruled by the

Court, and the defendant then and there excepted thereto, and said exception was duly allowed by the Court.

That the Court erred in allowing said witness to answer said question.

V.

At the conclusion and close of plaintiff's case, Mr. Richardson, counsel for plaintiff, said: "We will rest, I believe, your Honor," whereupon Mr. Smith on behalf of defendant moved for a non suit, upon the ground that the evidence of the plaintiff and his witnesses does not show any negligence on the part of the defendant whatsoever. It shows that the plaintiff does not know how this injury occurred, and the facts of the injury are left to inference.

COURT: I will overrule the motion. You may proceed with your testimony.

Mr. SMITH.: We will note an exception, your Honor.

And the defendant then and there excepted thereto, and said exception was duly allowed by the Court.

That the Court erred in not sustaining defendant's motion for non suit.

VI.

That during the trial of said action, Robert M. Betts was called as a witness on behalf of the defendant, and on his cross-examination by plaintiff's attorney, was asked the following questions:

Q. You did'nt know that the laws of the State of Oregon required you to have your wires insulated, did you, Mr. Betts?

Mr. SMITH: Objected to as incompetent, irrelevant and immaterial. Ignorance of the law is no excuse for anybody. If it requires it, it does; if it doesn't, it don't. It is for the Court to say. It is immaterial whether he knew it or not. Men have been hung when they didn't know what the law was.

COURT: You may answer the question.

Defendant objected to the foregoing question; the objection was overruled by the Court, and the defendant then and there excepted thereto; and said exception was duly allowed by the Court.

That the Court erred in allowing said question to be answered.

VII.

At the conclusion of the testimony of Robert M. Betts, witness on behalf of the defendant, defendant and plaintiff informed the Court that the testimony for and on behalf of the plaintiff and defendant was closed and no further testimony was given in said action. Whereupon Mr. Smith, as attorney on behalf of the defendant, interposed a motion for a directed verdict in the following words, to-wit:

Mr. SMITH: Before proceeding, if your Honor please, to get the record, we desire to interpose a motion for a directed verdict. The defendant at this time asks the Court to instruct the jury to return a

verdict for the defendant upon the following grounds: First, the evidence shows that both plaintiff and defendants are residents, citizens and inhabitants of the State of Oregon, and this Court has no jurisdiction of the case. The bare fact that the defendant is sued as receiver in a court action, does not give this court jurisdiction where the diverse citizenship does not exist.

Second, the evidence conclusively shows that Robert M. Betts, Lessee, was operating this mine, and electrical plant at the time of the injury and not Robert M. Betts as Receiver, and that by reason of the sale of the property, the duties of the receiver had terminated.

Third, that the evidence fails to disclose any proximate cause for the injury other than the negligence of the plaintiff himself. There is no negligence of the master which is shown to have contributed in any way to the injury.

Fourth, The testimony shows that the plaintiff was a volunteer, that the master owed him no duty; that his duties did not require him to be on the pole, or among the wires; that the master did not know that he was among the wires, or on the pole, or was attempting in any way to discharge duties thereon.

Fifth, The evidence shows that the injury was occasioned solely by the negligence of the plaintiff.

COURT: The Court will overrule the motion.

Mr. SMITH: We will note an exception on the several grounds separately, if the Court please.

COURT: Very well.

The defendant's motion for a directed verdict was overruled by the Court, and the defendant then and there excepted thereto, and said exception was duly allowed by the Court.

That the Court erred in not allowing defendant's motion for a directed verdict in this action.

VIII.

While Mr. Richardson, attorney for plaintiff, was making this argument to the jury, the following occurred:

Mr. RICHARDSON: Now, gentlemen, what about Mr. Betts? When we had Mr. Betts, this lessee Betts—lessee Betts on the witness stand, that he likes to be called. That is the title that he wants to be called. When he was on the witness stand, I asked Mr. Betts, I says, "Mr. Betts, what about these rubber gloves?" First I asked him if he was an electrician. "No." "How came you to suggest to Harry Harbert that you would give him rubber gloves? Did you have any there?" "No." "How came you to suggest it?" "Well, I just naturally thought about it. It just naturally kind of occurred to me that maybe he might want them." Now, gentlemen, there is a man that is not an electrician, a man that is not versed in the proper devices that an electric lineman needs, by his own admissions, and still he would come in here, and he would have you believe from that witness stand that he was the one that suggested

about rubber gloves. Gentlemen, I will tell you, that will not hold water. That does not appeal to a man of real common ordinary intelligence as being something that a man like Betts would think. It looks like it must be a lawsuit, gentlemen, that suggested that, or an injury that suggested that. It looks like the same thought suggested that to him that suggested that he was all of a sudden, instead of being a receiver of the Cornucopia Mines Company, he was a lessee.

Mr. SMITH: We except to the remarks of counsel, and assign them as error.

Mr. RICHARDSON: Your Honor, I did not make very many interruptions, and I am drawing inferences. The jury knows that I am not stating these as facts.

COURT: I will overrule the motion. You may save an exception.

That the Court erred in overruling defendant's motion in reference to the foregoing remarks of counsel before the jury in said cause.

IX.

Prior to the argument to the jury, the defendant duly requested in writing that the Court should give to the jury the following instructions, the same being numbered from one to thirteen inclusive, excepting therefrom instruction numbered seven which was given by the Court to the jury as requested by defendant.

Instruction No. 1:

I.

Gentlemen of the Jury, You are instructed to return a verdict for the defendant.

If the Court refuses to give the above instruction, the defendant excepts thereto, and without waiving such exception or his rights, requests the following:

Instruction No. 2:

II.

You are instructed that the evidence in this case does not show the proximate cause of the injury. You will therefore return a verdict for the defendant.

If the Court refuses the above instruction, the defendant excepts to such refusal, and without waiving his exception or his rights, requests the following instruction:

Instruction No. 3:

III.

You are instructed that the evidence in this case shows that the plaintiff was injured through his own negligence and not in the discharge of any duty of any kind whatsoever to the defendant. You are therefore instructed to return your verdict for the defendant.

If the Court refuses the above instruction, the defendant excepts thereto, and without waiving such exceptions or his rights, requests the following:

Instruction No. 4:

IV.

You are instructed that the evidence in this case shows that Robert M. Betts, lessee, was operating the mine and power plant at the time of the injury, and as he is a party to this action your verdict must be for the defendant.

If the Court refuses the above instruction, the defendant excepts thereto, and without waiving his exceptions or his rights, requests the following:

Instruction No. 5:

V.

If you believe from the evidence that Johnnie Bisher, at the time he was injured, was on the pole and was not in the discharge of any duty imposed upon him, or if he was on the pole in a furtherance of his own learning or enlightenment, and his duties did not require him to go up on the pole or among the wires, then he is what is known in law as a volunteer and he cannot recover in this case and your verdict must be for the defendant.

If the Court refuses to give the above instruction, fendant excepts thereto, and without waiving his exception or his rights, requests the following:

Instruction No. 6:

VI.

You are instructed that no person can recover damages from another for injuries inflicted by himself. If, therefore, you believe from the evidence that at

the time of the injury Johnnie Bisher received the same through any carelessness of his own, or while doing an act which his duties did not require, or in any other way than through the negligence of his employer, then I instruct you that he cannot recover in this action and your verdict must be for the defendant.

If th Court refuses to give the above instruction, the defendant excepts thereto, and without waiving his exception or his rights, requests the following instruction: (Instruction No. VII was given by the Court as requested by defendant.)

Instruction No. 8:

VIII.

Some testimony has been introduced as to rubber gloves and as to insulated nippers and as to body protectors.

I instruct you that the evidence fails utterly to show that the presence of insulated nippers or body protectors would have prevented the injury. You will, therefore, disregard this evidence for no negligence of any employer is ground for liability unless such negligence caused injury.

If the Court refuses to give the above instruction, the defendant excepts thereto, and without waiving his exception or his rights, requests the following:

Instruction No. 9:

IX.

As to rubber gloves, I instruct you that if you believe from the evidence that the nature or character

of the work in question was such that rubber gloves were not an essential requisite, then failure to furnish them would not be negligence.

I instruct you further that if you believe from the evidence that the employer did not know that Johnnie Bisher was working on the poles or among the wires, then the master would be under no obligation to furnish him any protection.

Instruction No. 10:

X.

I further instruct you that if you believe from the evidence that the master offered to or was ready and willing to furnish rubber gloves to his employes who were working among the wires, and that such employes knew it and failed to request them, then the fact that they were working without rubber gloves would be their own voluntary choice or way and the employer would not be liable for the injury and the verdict in this case would be for the defendant.

If the Court refuses to give th above instruction, the defendant excepts thereto, and without waiving his exception or his rights, requests the following instruction:

Instruction No. 11:

XI.

I instruct you further that the testimony in this case shows that the defendant, Betts, is a resident, citizen and inhabitant of Oregon, and plaintiff is also

a resident, citizen and inhabitant of the State of Oregon; the Court, therefore, has no jurisdiction of this case and you are directed to return a verdict for the defendant.

If the Court refuses to give the above instruction, the defendant excepts thereto, and without waiving his exception or his rights, requests the following instruction:

Instruction No. 12:

XII.

I further instruct you that the evidence in this case does not show that Harry Harbert had any right or authority to control or order Johnnie Bisher in the discharge of his duties, except such as pertained to sending up material and carrying the same from pole to pole. Harry Harbert was not a foreman, he was not a person in charge of the work or any part thereof, he was not discharging any duty of the master in relation to Johnnie Bisher, and whatever Johnnie Bisher did in mounting the poles or attempting to learn the work of an electrician or attempting to do anything in or about the wires was of his own voluntary choice or selection, and he cannot recover in this action, and your verdict must be for the defendant.

If the Court refuses to give the above instruction, the defendant excepts thereto, and without waiving his exception or his rights, requests the following instruction:

Instruction No. 13:

XIII.

I instruct you that the evidence shows that Johnnie Bisher knew the current was on these wires, also the volume of voltage and that said wires were alive, and if you believe that his duties as supply boy did not require him to work among the wires or on the poles, but that he was acting outside his duties as supply boy, then I instruct you that he assumed the risk of danger, and if he was injured outside the scope of his duties as supply boy then he assumed the risk of the injury and he cannot recover, and your verdict must be for the defendant.

The Court refused to give such foregoing instructions to the jury, numbered one to thirteen inclusive, excepting therefrom said instruction numbered seven which was given by the Court as requested by the defendant; and the defendant, prior to the retiring of the jury for deliberation, duly excepted to the action of the Court in refusing to give said foregoing instructions numbered from one to thirteen inclusive, excepting therefrom instruction numbered seven, which was given to the jury; and said exceptions were then and there allowed to each of said foregoing instructions.

That the Court erred in refusing to give said foregoing instructions to the jury as requested by the defendant.

X.

That the Court erred in allowing said cause to be submitted to the jury for the reason that there is no evidence showing that John L. Bisher was or is the guardian ad litem of John L. Bisher, Jr.

XI.

That the District Court erred in overruling defendant's motion for a new trial, which is as follows:

(Motion for New Trial.)

"In the District Court of the Unted States for the District of Oregon.

JOHN L. BISHER, Jr., by JOHN L. BISHER, his Guardian ad litem,

Plaintiff,

vs.

THE CORNUCOPIA MINES CO. OF OREGON, a corporation, and ROBERT M. BETTS, Receiver of Cornucopia Mines Company of Oregon.

"Now comes the defendant Robert M. Betts, Receiver of the Cornucopia Mines Company of Oregon, a corporation, and moves the Court to set aside the verdict of the jury and judgment entered thereon in this cause, and to grant him a new trial herein for the following reasons:—

I.

Court erred in overruling defendant's motion for non-suit.

II.

Court erred in overruling and refusing to grant defendant's motion for directed verdict at the close of all of the testimony on all the grounds stated in said motion, and on each ground separately.

III.

The verdict of the jury is contrary to the law and against the evidence.

IV.

That said verdict is against the clear weight of the evidence given at the trial.

V.

Error in law occurring at the trial of said action and excepted to by the defendant at the trial.

VI.

Excessive judgment and damages given against defendant and in favor of plaintiff which was given under the influence of sympathy, passion and prejudice.

VII.

That said verdict and judgment was against the law and contrary to the instructions as to the law given to the jury by the Court.

VIII.

That the Court rerred in refusing to give the instructions as to the law in the case requested by the defendant, and excepted to at the trial of said action.

IX.

This motion will be based upon the records and files in the above cause; the minutes of the Court and the Bill of Exceptions which is to be hereafter prepared and served upon the attorney for plaintiff herein, which Bill of Exceptions will contain also a full transcript of the testimony as taken and extended by the official stenographer of the above-named Court.

X.

The said District Court erred in rendering judgment in favor of the plaintiff and against the defendant for the reason that the same is contrary to the law and the evidence.

(Endorsed): Assignment of Errors. Filed Sept. 19, 1913.

WHEREFORE, the said defendant, plaintiff in error, prays that the judgment of the District Court of the United States for the District of Oregon in the above-entitled cause be reversed and same dismissed.

EMMETT CALLAHAN,
SMITH & LITTLEFIELD,
Attorneys for Plaintiff in Error.

ARGUMENT.

At the conclusion of all the testimony on behalf of the Complainant and Respondent, Mr. Richardson, as Attorney for Complainant, notified the Court that was all his case. Whereupon Appellant interposed

his motion for a directed verdict. (Transcript of Testimony, p. 336, et sequor.)

"MR. SMITH: Before proceeding, if your Honor please, to get the record, we desire to interpose a motion for a directed verdict. The defendant at this time asks the Court to instruct the jury to return a verdict for the defendant upon the following grounds: First, the evidence shows that both plaintiff and defendant are residents, citiens and inhabitants of the State of Oregon, and this Court has no jurisdiction of the case. The bare fact that the defendant is sued as receiver in a court action, does not give this Court jurisdiction where the diverse citizenship does not exist.

"Second, the evidence conclusively shows that Robert M. Betts, lessee, was operating this mine, and electrical plant at the time of the injury and not Robert M. Betts, as receiver, and that by reason of the sale of the property, the duties of the receiver had terminated.

"Third, That the evidence fails to disclose any proximate cause for the injury other than the negligence of the plaintiff himself. There is no negligence of the master which is shown to have contributed in any way to the injury.

"Fourth, the testimony shows that the plaintiff was a volunteer, that the master owed him no duty; that his duties did not require him to be on the pole, or among the wires; that the master did not know that he was among the wires, or on the pole, or was attempting in any way to discharge duties thereon.

"Fifth, the evidence shows that the injury was occasioned solely by the negligence of the plaintiff."

COURT: The Court will overrule the motion.

MR. SMITH: We will note an exception on the several grounds separately, if the Court please.

Mr. Richardson, counsel for Complainant (Bisher), stated:

"There is not any attempt on the part of the plaintiff in this case, by the service of any summons to hold anybody, to charge anyone with negligence, or to bring this action, or to prosecute this action against any one except Robert M. Betts, receiver of Cornucopia Mines Company of Oregon."

COURT: You sue him as receiver?

MR. RICHARDSON: Sue him as receiver, and him alone.

COURT: I understand, you do not sue him personally?

MR. RICHARDSON: No, your Honor, not personally. (Transcript of Record, p. 40.)

Mr. Betts, the Appellant, as a witness on direct examination, testified (Page 303, Transcript of Record, et sequor):

Q. Where do you reside, Mr. Betts?

A. At Cornucopia.

Q. Are you a citizen of the United States?

A. Yes, sir.

Q. Native born?

A. Yes, sir.

Q. And a resident and citizen and inhabitant of the State of Oregon, are you?

A. Yes, sir.

Q. You are the man who is named as defendant by being receiver of the Cornucopia Mines?

A. Yes, sir.

Witness testified page 304:

Q. Now, at the time of this injury, you were operating the mines there, were you?

A. Yes, sir.

Q. In what capacity?

A. As Lessee.

Q. I will show you this document, dated the first day of November, 1911.

COURT: Is that the first day of November? I think the answer says the ninth.

MR. SMITH: The certificate of acknowledgment is the ninth.

A. It was signed on the ninth.

Q. The certificate is the ninth. I didn't notice that before. This lease dated the first day of November, 1911, and acknowledged on the 9th day bby Mr. Thomas—the lease being signed by the Cornucopia Mines Company by Joseph B. Thomas, president, and Robert M. Betts—you signed it?

A. Yes, sir.

Q. The lease being executed by the Cornucopia Mines Company by Joseph B. Thomas, president, attested by Ina W. Hunter, secretary, and also signed

by you. You are the same person named in this lease?

A. Yes.

MR. SMITH: We will offer the lease, together with the date of recording as appears from the endorsement on it.

Witness testified page 306:

COURT: This lease was made prior to the time the receiver was appointed?

MR. SMITH: Yes. It was made the first day of November, 1911, and executed the ninth.

COURT: When was the receiver appointed.

A. The 21st of December.

MR. CALLAHAN: The receiver was appointed December 21, 1911.

MR. SMITH: The lease was both executed and recorded long prior to that time, when Mr. Betts was not a party to the proceedingg.

Page 307.

COURT: I will admit this lease and dispose of the other question afterwards. It might be necessary to submit that question to a jury to determine whether they were operating under this lease or under the receivership.

MR. SMITH: We will offer the lease in evidence, together with the endorsement of recording.

MR. RICHARDSON: We will save our exception.

Marked "DEFENDANT'S EXHIBIT "G."

Witness testified, page 308:

Q. I will show you this document, marked for identification "Defendant's Exhibit A," the one which Johnnie Bisher admits he signed. That is one of the documents you received, is it, Mr. Betts?

A. Yes, sir.

Q. For what period is that a receipt of labor?

A. That is for the month of July.

MR. SMITH: We will offer in evidence this document, if your Honor please.

COURT: Do you object to that?

Complainant's counsel here objected to the introduction of Defendant's Exhibit "A."

COURT: Your objection will be overruled. You may have your exception.

Marked "DEFENDANT'S EXHIBIT A."

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MR. RICHARDSON: This says the "Cornucopia Mines Company of Oregon to Mills, Bisher, Smith and Mills. Robert M. Betts, Lessee," stamped in there; no signature, but stamped.

COURT: I understand the boy admits his signature to that.

MR. RICHARDSON: He admitted that was his signature, but he didn't admit that there was any lessee on there, your Honor. He denies that was on there when he signed his name.

COURT: The jury heard that.

MR. SMITH: He didn't deny that it was on there. He said he didn't see it.

Q. Now, I will ask you, Mr. Betts, at the time that was signed, if that stamp was on there, "Robert M. Betts, Lessee"?

A. Yes, sir.

Witness testified, page 310:

MR. SMITH: The document down here says, "Robert M. Betts, Lessee," instead of Cornucopia Mines Company, and it is headed "To Mills, Bisher, Smith and Mills, of Cornucopia, Oregon. Contract for sacking concentrates and slimes." So many sacks, so much money—carrying it out. The date is "received July 15, 1912," and the boy signed up there instead of down here because there wasn't room, thirteen days before the injury.

Q. Now, after you got this lease, Mr. Betts, dated November 1st and recorded the 28th day of November, 1911, at 10:30 o'clock, who was in possession of that mine from the first day of November on?

A. I was.

Q. In what capacity?

A. As lessee.

Q. Were you operating it at the time you were appointed receiver?

A. Yes, sir.

Q. In what capacity were you operating it?

A. As lessee.

Q. You operated it until your lease expired, did you?

A. Yes, sir.

Q. As lessee?

A. Yes, sir.

COURT: What is the consideration for the lease, Mr. Smith?

MR. SMITH: My recollection is, it is a royalty. He is to pay so much of the proceeds. Therefore, he accounted right along and showed his expenses.

(Transcript of Record, p. 311):

"To pay to said lessor as royalty ninety per cent of the net mill returns of all ore extracted or to be extracted fro msaid mines; and said lessor is to have the sole and exclusive control and right to say to whom and how the ores extracted from said mines, and the concentrates therefrom, shall be disposed of, and said lessee will be directed solely and exclusively how said ores and concentrates shall be sold and disposed of."

Witness testified page 312:

Q. I direct your attention to a report of the receiver, parts of which have been read, that was filed in this Court August 30, 1912. After that date did you still operate the mine?

A. Yes, sir.

Q. In what capacity?

A. As lessee.

Witness testified further, page 315:

Q. Now, when you operated that mine, did you keep an account or keep a record of your expenditures for each month?

A. Yes, sir.

Q. I will ask you to look at these documents and see if they are the records that you kept, the extended records and reports?

A. They are.

Q. I notice on the top of each one there is stamped "Robert M. Betts, Lessee." When was that put on there, Mr. Betts?

A. Why, it was put on at the time the vouchers were made out. Some of them are put on with the typewriter. The bookkeeper sometimes put them on with the typewriter and sometimes stamped them.

MR. SMITH: To save time, I will just ask him the question, or if you wish to prove it by the document, I will show it to you.

Q. But do these documents, as lessee, show you the time of Johnnie Bisher? Does it show his working time?

A. Yes sir, they should.

Q. Will you find one that does, if you can?

MR. CALLAHAN: The first one.

Q. Colonel Callahan says th efirst one, Mr. Betts.

A. Yes.

Q. Have you the report there that shows it?

A. Yes, sir.

Q. Will you kindly read the item? Just read it out l uodso the jury can hear it, please.

A. "John Bisher, assistant lineman, 9½ days at $3.00 a day, $28.50."

Q. That is on this single report, is it?

A. Yes, that is on this. Total $28.50.

Q. Was that paid to him?

A. I am sure it was, yes, sir.

Q. This report is for the month of July, 1912?

COURT: Who signed that up when payment was made?

A. Mr. Buxton came up and got all the checks for the men working at the power plant, and he signed for them and took the checks down there.

COURT: Do you offer that in evidence, Mr. Smith?

MR. SMITH: Yes.

Its introduction was objected to by Mr. Richardson, counsel for complainant.

COURT: You offer that in connection with the Court records?

MR. SMITH: Yes, your Honor.

COURT: The objection will be overruled.

COURT: Isn't this one of the vouchers, or is it?

A. It is one of the vouchers.

MR. SMITH: This is a list of the expenditures that he made for a month. This is a compiled list from which he made the report, of course. This is the payroll itself.

MR. RICHARDSON: But it has never been an exhibit in this other case. His vouchers were never filed with the clerk of this Court in his receivership reports.

COURT: Haven't those been filed?

MR. SMITH: That is the reason I am offering it now, to get it in evidence.

COURT: I will overrule the objection. You may save an exception.

This document is Appellant's Exhibit "H."

POINTS AND AUTHORITIES.

Complainant and Respondent are both residents, inhabitants and citizens of the State of Oregon. This fact is conceded. That being a fact, the District Court of the United States had no jurisdiction in this case. The fact that respondent was sued as a Receiver does not give the Court jurisdiction where diverse citizenship is not alleged and proven. No Federal question, no Federal law, neither statutory or constitution, nor treaty provision was raised or involved as shown from the allegations of the complaint in this action.

Chief Justice Fuller, in the case of Gableman vs. Peoria, D. & E. R. Co., 179 N. Y., p. 339, said:

"That the mere order of a Federal Court, sitting in chancery, appointing a receiver, did not in itself form adequate ground of jurisdiction. We cannot accept the suggestion that the mere order of a Federal Court, sitting in chancery, appointing a receiver on a creditor's bill, not only enables the receiver to invoke Federal jurisdiction, but to do this independently of the ground of jurisdiction of the suit in which the order was entered, and thereby affect the finality of decrees in the Circuit Court of appeals in proceedings taken by him. The validity of the order of the appointment of the receiver in this instance depended on the jurisdiction of the Court that

entered it, and that jurisdiction, as we have seen, depended exclusively upon the diverse citizenship of the parties to the suits in which the appointment was made."

In the foregoing case, the Court further said:

"We decided that the suit was ancillary to the original cases in which the receiver was appointed, and that the jurisdiction was dependent on the ground of jurisdiction in those cases, and we also held that the receiver's orders of appointment were not equivalent to the laws of the United States in the meaning of the Constitution."

A case not depending upon the citizenship of the parties, nor otherwise specially provided for, cannot be maintained in the Federal Court unless some Federal statute, the Constitution, laws or treaties of the United States are involved, and that must appear affirmatively by plaintiff's allegations and cannot afterwards be supplied unless so alleged.

Palmer vs. Scriven, 21 Fed. Rep., p. 354.
Rice vs. Houston, 80 U. S. 13 Wall. 66 (20:484).
Willis vs. Missouri Pac. R. Co., 61 Tex. 434.
St. Louis I. M. & S. R. Co. vs. McCormack, 71 Tex. 661.
Armory vs. Armory, 95 U. S. 186 (24:428).
Texas & Pac. R. Co. vs. Richards, 68 Tex. 375.
Gingham vs. Cabot, 3 U. S. 3 Dall. 382 (1:646).
Robertson vs. Cease, 97 U. S. 646 (24:1057).
Davies vs. Lathrop, 12 Fed. Rep. 353.
Ex parte Smith, 94 U. S. 455 (24:165).
Beach, Receivers, No. 658.

Grace vs. American Cent. Ins. Co., 109 U. S. 278 (27:932).

The liability alleged by Complainant against Respondent arose under and was asserted under the Act of the State of Oregon known as the "Employer's Liability Act," page XXXVI, Vol. 3, Lord's Oregon Laws.

Suppose this action had to have been commenced in the State Court. The Receiver, under the act of March 3, 1887, as corrected by the act of August 13, 1888 (24 Statute at Large, Chapter 373, p. 552; 25 Statute at Large, Chap. 866, p. 433), could not have removed the cause to the District Court of the United States as that Court would not have jurisdiction from the mere fact that the Respondent was a receiver appointed by said United States Court. If such removal were made, a motion to remand same back to the State Court would be granted by the Federal Court as no Federal statute, constitutional nor treaty provision were involved.

Walker vs. Collins, 167 U. S. 57, 42 L. Ed. 76, 17 Sup. Ct. Rep. 738.

Blackburn vs. Portland Gold Min. Co., 175 U. S. 571, 44 L. Ed. 276, 20 Sup. Ct. Rep. 222.

Oregon Short Line & U. N. R. Co. vs. Conlin, 162 U. S. 498, 40 L. Ed. 1051, 16 Sup. Ct. Rep. 871.

Chicago R. I. & . R. Co. vs. Martin, 178 U. S. 245, 44 L. Ed. 1055, 20 Sup. Ct. Rep. 854.

Postal Teleg. Cable Co. vs. United States, 155 U. S. 482.

Western Union Teleg. Co. vs. Ann Arbor R. Co., 178 U. S. 239, 44 L. Ed. 1052, 20 Sup. Ct. Rep. 867.

Oregon Short Line & U. N. R. Co. vs. Skottowe, 162 U. S. 490, 40 L. Ed. 1048, 16 Sup. Ct. Rep. 869.

Sub. nom. Postal Teleg. Cable Co. vs. Alabama, 39 L. Ed. 231, 15 Sup. Ct. Rep. 192.

Chappel vs. Waterworth, 155 U. S. 102, 39 L. Ed. 85, 15 Sup. Ct. Rep. 34.

In the case of Graves vs. Corbin in the Supreme Court of the United States, page 471 Vol. 132 U. S., the Court said:

"This Court has held that when it appears to this Court that the case is one of which, under that provision, the Circuit Court should not have taken jurisdiction, it is the duty of this Court to reverse any judgment given below and remand the cause, with costs against the party who wrongfully invoked the jurisdiction of the Circuit Court.

Williams vs. Nottingway Twp., 104 U. S. 209.

"This rule has been recognized by this Court to the extent even of taking notice of the want of jurisdiction in the Circuit Court, although the point has not been formally raised in that Court, or in this Court."

Turner vs. Farmers Loan & Trust Co., 106 U. S. 552, 555.

Mansfield, C. & L. M. R. Co. vs. Swan, 111 U. S. p. 379, 386.

Farmington vs. Pillsbury, 114 U. S., 138, 144.

King Bridge Co. vs. Otoe County, 120 U. S. 225.

In the case of Frederick Bozman, receiver of the Rainier Power & Railway Company, vs. Samuel Dickson, 173 U. S. p. 113-115, Chief Fuller said:

"We are unable to find adequate ground on which to maintain jurisdiction. The contention of plaintiff in error seems to be that because of his appointment as receiver, the judgment against him amounts to a denial of the authority exercised under the United States, or of the right of immunity set up or claimed under a statute of the United States. It is true that the receiver was an officer of the Circuit Court, but the validity of his authority as such was not drawn in question and there was no suggestion in the pleadings, or during the trial, or so far as appears in the State Supreme Court, that any right the receiver possessed, as receiver, was contested, although on the merits the employment of plaintiff was denied and the defendant contended that plaintiff assumed the risk that results in the injury and had also been guilty of contributory negligence."

In this connection the Court further said that:

"The mere order of the Circuit Court appointing a receiver would not create a Federal question under Section 709 of the Revised Statutes, and the Receiver did not set up any right derived from that order, which he asserted was abridged or taken away by the State Court. The liability(of the receiver) to Dickson depended upon principles of general law

applicable to the facts and not in any way upon the terms of the order."

Witness Betts testified, page 318:

Q. But the signature on this Exhibit "A" is Johnnie Bisher's own signature?

A. He admitted it.

Q. The one dated July—

A. Fifteenth.

Q. Fifteenth, whatever it is?

A. Yes, sir.

John L. Bisher (complainant) gave the following testimony (Transcript of Record, page 78, et seq.):

Q. Who hired you? Do you know for whom you were working at that time?

A. Mr. Betts hired me.

Q. Well, do you know? It was he himself, was it?

A. I called up over the telephone.

Q. Now, something was said here this morning about Mr. Betts running that mine as lessee. You knew that he was running it away along in November, didn't you, before November?

A. I knew he was manager there.

Q. You have been up at the tunnel at the mine, haven't you?

A. The tunnel?

Q. Yes.

A. Yes, sir.

Q. You have been at the mill?

A. Yes, sir.

Q. You have been at the office?

A. Yes, sir.

Q. Did you ever see those notices that were posted there stating who was running that mine, that Mr. Betts was as lessee?

A. I never noticed it, never stopped to notice. When I went in the office, I just went after my check.

Q. You, of course, could write before you were hurt?

A. Yes, sir.

Q. You wrote right-handed, too, didn't you?

A. Yes, sir.

Q. Would you know your signature, if you should see it?

A. I am pretty sure I would?

Q. I will ask you if your name was signed to that paper by yourself?

A. Yes, sir.

Q. And did you notice at the time that that was Mr. Betts lessee?

A. I never noticed.

Q. His name being there?

A. I never noticed that.

Q. This is a receipt for a voucher, isn't it? Or it is your voucher for work, dated July 15, 1912, about a week before you were hurt?

A. I don't know why I signed that.

Q. Well, it is a receipt, isn't it, acknowledging that you have been paid for your work?

A. I don't remember ever signing that, but I know the signature.

Q. Yes, that is your signature, isn't it?

A. Yes. I don't remember ever seeing those little slips like that on the one I signed.

Q. And Mr. Betts' name is Robert M. Betts, just like that there, isn't it?

A. I never seen that "Robert M. Betts, Lessee," before like that.

Q. You didn't notice that at the time? Is that it?

A. I never did notice it.

Q. His name is Robert M. Betts, isn't it?

A. I have seen that Robert M. Betts.

MR. SMITH: We will ask to have this document identified. Then I will show it to Mr. Richardson marked "Defendant's Exhibit A."

In the examination of Robert M. Betts, a witness for Respondent, his report as Receiver was introduced in evidence. (Transcript of Record, p. 313 to 315 inclusive). Plaintiff in error would call the Court's attention to Section 3 of said report:

"3. That during the said receivership of said Cornucopia Mines Company of Oregon as aforesaid he held and operated said Mines under a written lease with said Cornucopia Mines Co. from the first day of November, 1911, until the first day of November, 1912.

"4. That hereby submits this his final report of the operation of said mines under said lease and receivership to this Court.

"6. That all the property of every kind and character, real and personal, and all assets of Cornucopia Mines Company of Oregon, Respondent, were sold under a decree and order of this Court on the 29th day of June, 1912, by Ed Rand, the Special Master of the district Court of the United States for the District of Oregon, who was theretofore appointed by this Court as such special master, and before said sale as aforesaid he duly qualified as such special master; that at such master's sale as aforesaid, said property, real and personal, was sold to C. E. S. Wood, as trustee, by said Ed Rand, as Special Master of this Court, and said sale was afterwards by this Court duly confirmed.

"7. That there is no other property, real or personal, of said Cornucopia Mines Company of Oregon, Respondent, unsold or remaining to be administrated upon by said Receiver."

The testimony shows, and it is not contradicted, that Robert M. Betts personally was operating the mine and electric power plant and the electric wires over which the current was conducted, under a valid recorded lease to the whole thereof, which lease ran from the 1st day of November, 1911, to October 31, 1912. Said lease was signed and executed on the 9th day of November, 1911, by the lessor and lessee thereto.

Section 744, in relation to liens on mines, Lord's Oregon Laws, Vol, 3, p. 2662, provides, among other things:

> "AND PROVIDED FURTHER, that this section shall not be deemed to apply to the owner or owners of any mine, lode, mining claim, deposit, shaft, tunnel, incline, adit, drift, or other excavation, road, tramway, trail, flume, ditch or pipe line, building, structure or superstructure, when the same shall be worked by a lessee or lessees, or by any person or persons other than the owner; PROVIDED, the lessor or lessors, or other person or persons other than the owner of any such mine, lode, deposit, shaft, tunnel, incline, adit, drift, or other excavation, mill site, or mill, shall have recorded in the mining records of the County wherein any such mining property is located, a copy of such lease, or any other instrument, before the work shall have begun on such property, except as hereinafter stated; provided, further, that the owner or owners of any such mine or mines, lodes, deposits, shaft, tunnel, incline, adit, drift or other excavation, mill or millsite, shall, in the manner hereinafter prescribed, post, or cause to be posted, at not less than three conspicuous places upon such mine, at or near the place thereon where the same is being worked or developed, a notice in writing, signed by the owner or owners of such property, stating the name or names of the lessees, or other person or persons other than the owner operating said property, and that the owner or owners thereof will not be responsible for any debt or debts contracted by the lessee or lessees, or other person or persons other than the owner, in connection with the working, operation or development of such property, or for any work, improvement or development thereon under such lease or other instrument."

When Bisher (complainant) was being cross-examined, his attention was called to the fact, and he was asked if he did not see notices that the mine was being operated by Robert M. Betts, as Lessee, posted at the mill, tunnel and office of said mine. He evaded a direct answer by saying that he had been at all of those places but that he went to the office to get his pay.

It is not necessary as a matter of law, or under the foregoing statute, that Respondent should prove that the employees of the lessee operating the property, had seen the notices that the property was being operated under a lease; the presumption is, or it is incumbent upon the employees to have notice thereof if said notices were posted as required by law. Under the express provisions of the foregoing section (No. 7444), no lien can be held or enforced against mining property for labor performed, or injuries caused while the mine is being operated under a lease where the lease was recorded before the work was begun.

Lewis vs. Beeman, 46 Ore. p. 311; 80 Pac. 6. 417.

We take it that it cannot, in the light of the testimoney, be seriously contended but what Robert M. Betts was working and operating the electric power plant and mines of the Cornucopia Mines Company of Oregon from the first day of November, 1911, to the 31st day of October, 1912, as lessee; you will note the injury complained of and alleged by complainant in his complaint occurred on the 28th day of July,

1912, during and at the time that Robert M. Betts was operating said electric power plant and mines as lessee. Further the testimony shows that Bisher, the complainant, received and receipted for his pay during all the time he was in the employ at the Cornucopia Mines of Oregon from Robert M. Betts as lessee, and not from any other person, corporation or source. See Defendant's Exhibits "A," "G" and "H."

There is no contention on the part of the complainant but what the mines and power plant were sold under a mortgage foreclosure under a decree and order of the United States District Court for Oregon on the 29th day of June, 1912, just thirty days before the date (July 28, 1912) of the alleged injury to complainant, by Ed. Rand, the Special Master of the District Court of the United States for the District of Oregon, who was theretofore appointed by that Court as such Special Master, and before the sale as aforesaid he duly qualified as such Special Master; that at such Master's sale as aforesaid, said property, real and personal, was sold to C. E. S. Wood, as Trustee, by said Ed Rand, as Special Master of said Court, and that such sale by said Special Master was afterwards by said Court duly confirmed.

By the statute of the State of Oregon, Section 252, Lord's Oregon Laws, Vol. 1, p. 269, it is provided who is entitled to possession at an execution or foreclosure sale of real property. Said Section is as follows:

"The purchaser from the day of sale, until a re-

sale, or a redemption, and a redemptioner from the day of his redemption until another redemption, shall be entitled to the possession of the property purchased or redeemed, unless the same shall be in the possession of a tenant holding under an unexpired lease, and in such case, shall be entitled to receive from such tenant the rents or the value of the use and occupation thereof during the same period." And operated mines, power plant and appurtenances for the full term of his lease.

It is therefore plain that this case should have been dismissed, as Betts was sued as receiver and not as lessess (Record, page 40).

This section has been interpreted and passed upon by the Supreme Court of Oregon in:

Cartwright vs. Savage, 5th Ore. 397.

Bank of British Columbia vs. Harlow, 9th Ore. 388.

U. S. Mortgage Co. vs. Willis, 41 Ore. 484, 69 Pac. 266.

Eldridge vs. Hofer, 45 Ore. 243, 77 Pac. 874.

Gest vs. Packwood, 39 Fed. 532.

Balfour vs. Rodgers, 64 Fed. 927.

On and after the 29th day of June, 1912, when said mines and electric power plant were sold under the decree of foreclosure and order of said Court, the purchaser immediately on the day of sale took possession of said property under the foregoing statute, and by operation of law, and as a matter of law the property could not have been operated or controlled by Robert M. Betts, as receiver. His receivership

therefore could not be more than a mere empty shell, after the sale and purchase of the property by Wood as Trustee, there was no longer any property left for the Receiver to hold, work or operate.

At the time of the sale under the foreclosure of the mortgage of the Cornucopia Mines Company's of Oregon property, whatever interest or claim Betts had was on that date (June 29, 1912), extinguished, and the purchaser at the sale succeeded thereto instanter.

You will note that this sale was had on June 29th, 1912; the injury is alleged to have happened on July 28th, 1912. (See T. R., page 313.)

At the date of injury it was impossible for Betts, as receiver, to be operating the mines and electric power plant.

But he was operating it as lessee, because:

(A) His lease became effective on November 9th, 1911.

(B) Its term was one year duration.

(C) Betts as lessee was not a party to the foreclosure proceeding.

(D) He took and held possession under the lease.

INSUFFICIENCY OF EVIDENCE.

At the close of plaintiff's case, the defendant moved for a non-suit upon the grounds that the evidence was insufficient. (B. E., page 26; Trans. Test., page 91.) The motion was overruled and an exception taken.

AUTHORITIES CITED IN ARGUMENT BY PLAINTIFF IN ERROR:

POINT I.

Physical facts showing injury--
Verdict unsustained.

Peat v. C.M. & St.P. 107 N.W. 355.

POINT II.

Witnesses who "Don't remember"
"Didn't recollect", etc.

Idaho Mercantile Co. v. Kalangram
8 Idaho 101 (109); 66 Pac. 933.

And thereafter, and at the close of the testimony and before argument, the defendant further moved for a directed verdict upon the grounds specified in said motion. (B. E., 26-28; Trans. Test., 336-338.)

Having described the first two grounds of said motion, we now come to the third, which is as follows (B. E., page 27):

"That the evidence fails to disclose a proximate cause for the injury other than the negligence of plaintiff himself, and that there was no negligence of the master which was shown to have contributed in any way to the injury."

STATEMENT OF FACTS.

At the time Bisher was injured he was working on the pole in the presence of himself and Harry Harbert, the lineman.

In telling how he was hurt, Bisher says as follows (Trans. Test., page 48):

Q. What did he tell you to do before?

A. He told me to wrap one end while he wrapped the other. He says, "We can do it quicker."

Q. What did you to do when you got up on top of the pole?

A. Well, he had already had one end of the middle wire, tie wire, unwrapped, and I unwrapped my end and took the middle wire in my right hand and started to lift it over the pole as we had been doing before.

Q. Why did you lift the wire over the pole, or

did anyone tell you to do that, Johnnie?

A. Harry told me to do that.

Q. What did he tell you to do that for?

A. Well, to keep it farther away, so it wouldn't be apt to touch the other wire.

Q. Now, what happened when you were lifting this wire?

A. I just started to lift the wire up with my right hand. I was standing just—the wires came nearly to my shoulders—just about that high. I had to get up high enough because they were pretty heavy. I just started to lift up the middle wire, and that is the last I remember.

At pages 55-56 the witness describes his position on the pole.

At page 61 witness says, on cross-examination:

Q. Do you know what part of the wire you touched with your left arm, or what part of your left arm touched the wire?

A. I don't remember anything about it. The last thing I remember was when I started to lift up the wire with my right hand.

Q. You don't know how you were hurt?

A. I don't know how this came in contact, this hand, at all.

Q. You do know that you had to touch two wires to get a shock, don't you?

A. That is what Mr. Buxton told me.

Q. They always told you not to touch two wires?

A. Yes, Mr. Buxton told me.

Q. You didn't have any duties that required you to touch two wires, did you, at the same time?

A. No, sir.

* * *

Q. You knew those wires were live, didn't you?

A. Yes, sir. He told me they were 2300 volts.

At pages 65-66 the witness says:

Q. And neither you nor Mr. Harbert had met with any mishap because of these wires before, had you?

A. No, sir.

Q. Now, you knew when you were working there that these were high-tension wires?

A. Yes, sir.

Q. And carrying a high voltage?

A. Yes, sir.

Q. You were cautioned not to touch two of them at the same time?

A. Yes, sir.

At page 69:

Q. How long had you known that those wires carried that voltage? Did you know it every day you worked there?

A. Oh, I had known it ever since I had been in the country—I heard that.

Q. Of course, you had known that electricity was very dangerous, haven't you?

A. Yes, sir.

And at pages 74-75:

Q. Now, do you know whether, as quick as you

got into trouble, Harbert struck your hand and knocked it off the wire?

A. I don't know anything about it.

Q. You don't know what happened at all after you got shocked?

A. I don't remember anything after I started to lift up the middle wire.

Q. And you cannot tell the jury now how you happened to lift up these two wires?

A. No, sir, I can't do it.

Q. No duty you had required you to touch two live wires at the same time?

A. No, sir.

And on page 76 the witness says, in describing his position on the pole:

Q. Where was your left hand?

A. I don't know. Sometimes they were heavy, and if we just had to lift them straight up, I would lift them with both hands.

And at page 77:

Q. And you don't know whether that was the situation or not?

A. I don't think he had hold of the wire at all, but I don't remember for sure.

And at page 89:

Q. Concerning these pliers, you were not using pliers when you were hurt, were you?

A. I did just a little before.

Q. At the time you were hurt you were not working with pliers, were you?

A. No, sir. I just started to lift up the wire.

Q. And the pliers that were used there by Harbert didn't have any insulated handles, or anything of that kind, did they?

A. No, sir.

Q. So you were not hurt by reason of the pliers?

A. No, sir.

Q. And at one time also you spoke of a pad, or a protection, I believed you called it a belly pad that men sometimes used?

A. I didn't say anything about a belly pad.

Q. Well, it was brought out in the opening statement. Do you know where they use those pads, and under what circumstances?

A. No, never heard of a belly pad.

* * *

Q. And you were not hurt by reason of not having a pad in front of your body? It was your arms that came in contact with the wire?

A. Yes, sir.

Witness Harbert thus describes the injury (Record, page 154):

Q. What work could Johnnie Bisher do in the position that he says he was in?

A. Well, at the time of the accident, he couldn't have done a thing.

Q. Was he doing any work at the time of the accident?

A. No, at the time of the accident he was standing on the pole, he was leaning with his left arm

hold of this wire, just as a rest, leaning back. He was standing in this position. And when I seen him, that hand was thrown up and hit right across the wrist. It might have been up further, too. But the whole hand just was stuck there. Of course, when it hit the other wire, it stuck.

Q. What did you do?

A. I loosened my safety and pulled out my hooks, so they would be loose, and reached over and knocked that arm off.

And at page 160:

Q. When this young man got hurt, he was not hurt by any static condition there?

A. No, sir, he had hold of both wires, or else he hit one hand against the other wire.

Q. Came in contact with them, did he?

A. Yes, sir.

Q. Do you know of any conceivable duty, is there any possible duty, that a lineman has to discharge that would require him to catch two of those live wires at the same time?

A. No, sir.

And at page 164:

Q. You were putting this porcelain insulator in where the glass was, one like that?

A. Yes, I just started to put that on.

And on page 168 the witness says:

Q. Well, whatever it is, the jury saw. Now, you claim that he had his hand, he had hold of the wire with his left hand?

A. With the left hand, yes, sir, was the hand he was resting on the wire on this side.

Q. Now, I wish you would please tell the jury whether, if you have a tight hold on a wire, and voltage goes through it, we will say 2300, and with the other hand you touch another one, which hand is it that is going to get the burn?

A. Why, the one that you touch, because if you have a tight wire you will get more of a shock but less burn. Wherever it arcs, wherever the wire is right close to the hand, but not quite touching, it will arc across; after it touches once, it draws an arc.

Q. What do you mean by an arc?

A. That is the fire.

Q. Just like a stroke of lightning?

A. That is the burn. The arc, that is the fire.

Page 196, on cross-examination:

Q. Now, you stated, I believe, on your direct examination, at the time this accident happened, Johnnie had his left hand on the wire?

A. He had hold with the left hand.

Q. He had what?

A. He had hold of the wire with his left hand.

Q. Which wire?

A. This wire right here. This insulator was on the side of the cross arm. That insulator was on that. Two insulators tied in. That insulator there was tied in. This wire was laying over here. As I say, I just started to screw that insulator on. John-

nie was leaning back here on his spurs and was holding onto this wire.

Q. What was he holding onto that wire for?

A. Why, for a rest, I should suppose. That is what I usually do. I couldn't say that.

Q. Do you usually hold on there to rest? You get tired, you grab hold of the wire to hold yourself up?

A. I cannot say I do. But I often put my arm over anything like that. I have done that. And when he had hold of this wire he must have flung his hand up. I didn't see him throw it up, but I must have seen it the second he got it up. That hand was laying, or looked like to me, the wire was right across there like that—he just hit the wire.

At page 197:

Q. Now, did you say anything to him while he had his arm or hand, left hand, up on that wire?

A. It happened so quick, it was all over in a second.

At page 198:

Q. How was he holding that wire with his left hand?

A. This way.

Q. Just had hold of it with his hand?

A. Just had hold of it with his hand.

Q. Just gripped with his hand, left hand?

A. Yes, left hand.

Q. That is the part of his hand he has left now? You know his right hand is off entirely?

A. Yes.

Q. And he had hold of that?

A. Yes, sir.

Q. And he was in that position when the accident happened?

A. He was.

These two are the only witnesses to the accident and the only persons who know the facts of the case, and each one asserts that he knows nothing as to how it happened. Question: Where, then, is proof of the negligence of the master?

The negligence of the master is left to inference and conjecture. There is no proof on the subject. It is as easy to infer that the injury was caused by the negligence of Johnnie Bisher as by the negligence of the master, and the proof is just as strong.

In addition to the above testimony, this record conclusively shows that no electrician, or lineman, or person, connected with the plant has any duties to perform which require him to touch two wires at the same time.

Witness Bisher's testimony, supra.

Witness Harbert's testimony, supra.

L. W. Sloper (plaintiff's expert) testifies (pages 118-119):

Q. Now, can you conceive, or do you know of any duty that a lineman has to perform anywhere that requires him to touch two of these live wires at the same time?

A. That is something we try to keep from doing.

Q. Well, now, will you kindly answer that question? Is there any possible duty that he could be performing that would require him to touch two wires at the same time?

A. Not that I ever heard of, no.

Q. If he would, his work would be pure carelessness, wouldn't it?

A. Well, we all make mistakes, you know.

Q. Kindly answer the question. Wouldn't it, in your judgment?

A. Well, I don't consider it that way, no. I know too many get it to do it.

Witness Myers (defendant's expert), page 210:

Q. You have seen men who have been shocked by electricity, and know where the shock comes, don't you?

A. I have seen a couple of them.

Q. Suppose a man has a tight grasp of one wire charged with 2300 volts, and should hit the other one, which hand would show the burn?

A. The one that made the least contact.

Q. The one that had tight hold would not show much of a burn?

A. No, it would not show much of a burn in proportion.

Q. You say the one that drew the arc would show the burn?

A. That is where the heat is.

Q. That drawing an arc is just the electricity shooting across the air?

A. Shooting across and pulling the arc across.

Witness Frank A. Hull (defendant's electrician), pages 230-231:

Q. You have seen in your experience the effect of electric burns, haven't you?

A. Yes, two or three.

Q. Suppose that a man were working on this pole —you see the picture of it—the regular lineman over here, and the young fellow on this side, suppose the young fellow was standing down the pole so that his chin was just about even there, can you think of any duty he could perform, or aid in performing with the other fellow changing those insulators?

A. Why, I don't know as he would be of any material help to a man there at all.

Q. Suppose that he were in that position, and had his hand up ahold of this wire, and that through some way he must have come in contact with another wire, which hand would show the heavier burn if he had hold of the wire, 2300 volts, with his left hand, and happened to hit another one with his right hand or arm?

A. The burn would show up where the arc would be, he more than likely would get a shock, and the contact would be where the arc would, of course, be where it was loose, where the contact was being broken.

Q. The hand that was closed over the wire, then, wouldn't show the burn?

A. Naturally it wouldn't be burned so bad.

Q. And the one that would be burned?

A. Would be where the arc hit it.

Q. You mean the arc, the lightning flash or stroke of jumping electricity?

A. Yes. Oftentimes happens when you let go—if you let go there, the arc would follow.

Witness C. A. Buxton (defendant's general electrician), page 275, says:

Q. Is there any possible duty that you can think of, or ever heard of, that Johnnie would be discharging if he got against both of the wires at the same time—was there any duty that required him to do it?

A. No, sir. If he did, it would be done thoughtlessly, not in the discharge of his duties.

The above evidence is from the following witnesses:

Johnnie Bisher, plaintiff.

L. W. Sloper, plaintiff's expert.

Harbert, defendant's lineman.

Myers, defendant's expert.

Hull, defendant's expert.

Buxton, defendant's general electrician.

They all agree upon the following points:

A. It takes a double contact to get a shock.

B. No conceivable duties require a man to touch two live wires at the same time.

C. Johnnie Bisher necessarily received a double contact; that is, he touched two live wires at the same time.

Argument is unnecessary. He was not in the discharge of his duties when he received the shock, and it was clearly the result of his own carelessness.

Therefore, we see that the evidence not only fails to disclose a proximate cause for which the defendant is liable, but it conclusively shows the injury to be due to the negligence of the plaintiff.

POINTS AND AUTHORITIES.

Under this branch of the case, we submit the following Points and Authorities:

POINT I.

The plaintiff must show the proximate cause of his injury to be a neglect of some duty of the master. Failing in this, his case falls.

Patton vs. T. & P. R. Co., 179 U. S. 653, Book 45 L. Ed. 361.

Stratton vs. Nichols Lumber Co., 39 Wash. 323 (109 Am. Sta. 881).

POINT II.

Evidence which is as compatible with the negligence of the plaintiff as the proximate cause of his injury, as it is with the negligence of the defendant, proves nothing. The burden of proof is on the plaintiff.

Grant vs. Ry. Co., 133 N. Y. 657 (33 N. E. 220).

Tyndal vs. Old C. R. Co., 156 Mass. 503 (31 N. E. 655).

POINT III.

Where the evidence shows the injury to have been caused by the negligence of the plaintiff, he cannot recover.

Patton vs. Ry. Co. (Supra).

Stratton vs. Nichols Lumb Co. (Supra).

POINT IV.

The Employers' Liability Act of Oregon, Laws of Oregon, 1911, page 16, does not limit or restrict the defense that the injury was caused by plaintiff's own negligence. There is a vast difference between "own negligence" and "plaintiff's contributary negligence."

INSUFFICIENCY OF EVIDENCE (Continued)

Volunteer.

The evidence, we think, conclusively shows that Johnnie Bisher was a volunteer; that he had no duties whatsoever on the pole, and especially none that required him to touch two wires.

Upon this point the record shows:

Witness John L. Bisher, Jr., plaintiff (page 43):

Q. And what did you do when you went to the mine?

A. Well, the first night I worked on the rock crusher.

Witness says he was directed to work there by Mr. Bishop, the superintendent of the mill; thereafter he worked by the compressor room; thereafter

he wheeled out dirt (page 44); thereafter shoveled rock into the crusher; thereafter helped tear out floors and take out old machinery; thereafter worked on the dump; thereafter (page 45) dug trenches for concrete foundation. Ed Mills was foreman. Mills told Bisher that Buxton wanted him on the line.

Q. (Page 45) What did Buxton tell you when you got down there?

A. I went down to the town. I met Harry Harbert down there and he told me to come over to the store and he would get some tools there, and I asked him what he was going to do, and he said he would wire a few houses before we worked on the line. And we wired a saloon, and then went over—he put in a light at the hall; **I JUST HANDED HIM TOOLS**. And then we went, the next job, we went up to Mr. Bett's house and put some wires in his house. Then one day we went down to the power house, and Mr. Buxton told us what kind of a tie to put on the pole.

And we here, and now, respectfully ask the Court's attention to the last statement of this witness just made, wherein he says:

"**MR. BUXTON TOLD US** what kind of a tie to put on the pole."

Q. Did he show you how to tie it?

A. He showed how to tie it. He made an insulator there, and he also had a wire, and a tie wire, and he cut and wrapped that around the insulator, and showed—Harry Harbert just before that had figured out a tie, and Mr. Buxton, when we got down there,

said that wouldn't do—**AND HE SHOWED US ANOTHER ONE**, and he said that that was the one he wanted to use. And we told him all right. And he told me to help Harry Harbert.

Q. He told you to help Harry Harbert? (Page 46).

A. Yes, sir.

Q. Then what did you do?

A. Well, we went up the road a little ways, and Harry fixed poles.

Q. What did Mr. Buxton tell you to help Harry Harbert to do?

A. He didn't say just what to do. He just said, help Harry. He said Harry would tell me what to do.

Q. He said Harry would tell you what to do?

A. Yes, that was down at the power house.

Q. Well, what did Harry tell you to do?

A. Well, Harry climbed the pole, and I just carried some of the tools along first, and he went up the pole and fixed three or four himself. Then he told me, he says, "Well it is pretty hard standing up there so long." He said, "We will take turns about." He said, "You come up and fix one, and I will fix the next one." I said, "All right," because Buxton told me to do what he would tell me; that he would tell me what to do. He went up there, and told me to fix the other one. He said it would be easier on both of us. We did that for a few times. He worked a day or two that way, and then he saw that was pretty hard standing up there so long for one man, and he said,, "We will both come up at the same time." He

says, "One can wrap one end of the tie wire while the other wraps the other." He said, "We can do it quicker," and he says, "We can watch each other at the same time," and he says, "Maybe we won't get no shock if we watch each other. Maybe it will make it safer." And that is the way we were doing when I was injured.

Q. Now, this last pole, who climbed this last pole first that way—climbed the pole on which you were injured?

A. Harry.

Q. What did Harry tell you to do?

A. He just told me to put some insulators in the sack, and tie it to the rope, and he would draw it up. Then he told me to come up and do as I had done before.

Q. Well, what did he tell you to do when you got up on top of the pole? Did you get on top of the pole?

A. Yes, sir. I just got so my head was up, oh, just up about between the wires, about like that (illustrating.)

Q. And where was Harry Harbert at this time?

A. He was on the opposite side of the pole.

Q. He was on the opposite side of the pole?

A. Yes, sir.

Q. About the same distance up the pole?

A. About the same distance.

Q. (Page 48). What did Harry tell you to do?

A. Well, he just said to fix—he didn't say just what to do then, because he told me what to do before.

Q. What did he tell you to do before?

A. He told me to wrap one end while he wrapped the other. He says, "We can do it quicker."

Q. What did you do when you got up on top of the pole?

A. Well, he already had one end of the middle wire, tie wire, unwrapped, and I unwrapped my end, and took the middle wire in my right hand and started to lift it over the pole, as we had been doing before," etc.

It is thus plain, from Bisher's own testimony, that on the particular arm in question he did not wire in a single insulator. The insulator at either end had been wired in before he got up on the pole. He was not, therefore, doing the work, as he claims in his testimony, as he had done before.

Although Witness Bisher, at Page 48, says:

Q. What did Harry tell you to do?

A. Well, he just said to fix—he didn't say just what to do then, because he told me what to do before.

Yet, at Page 48, he says:

Q. Why did you lift the wire over the pole, or did anyone tell you to do that, Johnnie?

A. Harry told me to do that.

Concerning this same thing, Harry Harbert says (Pages 155-156):

Q. Did you request him to come up there to help you at that time?

A. No, sir.

Q. Did you at any time request him to work on these poles on that work with you?

A. No, sir.

Q. What was he there for?

A. Well, he was there to help me carry insulators, send the insulators up to me.

Q. How did you handle getting insulators from him up to you?

A. (Page 156). I had a rope tied on my belt to a concentrate sack, similar to a gunny sack, tied on the end, to pull them up.

Q. He would be down on the ground, would he?

A. Yes, sir.

Q. A position of perfect safety?

A. Yes, sir.

At pages 161-162:

Q. Now, I believe you stated yesterday that you had put on the new insulator on both the outside pegs?

A. I did.

Q. The wires were tied in?

A. Tied in, yes, sir.

* * *

Q. Now, did you do the work of completing that line, putting the insulators on?

A. I did.

Q. Did you ever have any helper there on the line?

A. No, sir.

Q. A man hired to help you?

A. No, sir.

Q. You completed it alone, did you?

A. Yes, sir.

Q. Now, do you know what Johnnie was doing while he was up there on that pole?

A. Well, **he was up there to see what I was doing.** He wanted to learn the business, and I was showing him everything I could.

Q. Did you hear him testify yesterday that you had told him to come up and help you, or words to that effect?

A. Yes, I did. I heard him testify.

Q. Well, had you ever done so?

A. No.

* * *

Q. (Page 163). You heard him state yesterday, did you, about his position on the pole, about his chin being just above the cross arm so he could see?

A. Yes, sir.

Q. Is there any work he could do in that position?

A. Well, not in that position, no. He would have to be a little higher to do any work to speak of.

(Page 173):

Q. What do you call a boy that runs along the ground and carries those supplies?

A. Usually call him a grunt, or helper, things like that.

Q. Did his duties as helper out there require him to get into any dangerous place at all?

A. No.

Page 187 (cross-examination):

Q. Well, what was he out there for?

A. At work.

Q. Along the line? You said he was along the line, wasn't he?

A. Well, he was to carry insulators, cut tie wires, do things like that; send them up to me when I wanted them. That was my understanding.

Q. You knew he was to help you, didn't you?

A. How is that?

Q. You knew he was instructed to help you, didn't you?

A. Yes.

Pages 188-189:

A. When he started to climb the pole? I don't think I said a word to him when he started to climb. I was up there working.

Q. Did you say anything to him when he got to the top?

A. I think it was on that very pole—I wouldn't swear to it—that I cautioned him about the wires.

Q. Now, he had been up other poles. He had been climbing other poles before this, hadn't he?

A. I think he was on—

Q. What about the pole before?

A. I should say he was on three poles before that with me.

Q. On three poles? What did he do on those poles?

A. Well, he brought up insulators, and on one pole

he tied the wire on one wire. I showed him how and let him do that.

Q. Now, didn't you say yesterday that you took the insulators all up by a rope?

A. Did I say all of them?

Q. Yes.

A. I don't know whether I said that or not. I think I said that was what I understood his duties to be; that he sent the wires up to me. But I didn't say that he wasn't on a pole, because he was.

Q. Then was there any necessity for him to be on the pole if you had a rope to take up the insulators?

A. No, not necessarily. No necessity.

Q. And what did you say to him when he got up on the pole?

A. I cautioned him about being on this pole, told him he didn't have to come up there. I didn't have any authority to fire him down, or anything like that.

Q. You didn't?

A. No, sir.

Q. You didn't want to hurt his feelings, did you?

A. Well, Johnnie—I liked Johnnie, and would show him everything I could.

Q. Did you show him how to make a tie?

A. I think he watched me, yes.

Q. He didn't make the tie himself?

A. No.

* * *

Q. You don't remember?

A. No. not whether he lifted a wire or not. I know in this particular case he didn't.

Q. But you cannot testify as to what he did on the other poles before you reached this last pole, on which the accident happened?

A. Well, he watched me there, and on one pole, as I told you, he tied over on one side there on one of the wires.

Q. Now, did you tell him that he was not expected to climb any poles?

A. Yes, sir.

Q. You told him that, didn't you?

A. I told him there was no use in it; he was not paid for that.

Q. Well then, tell me, Mr. Harbert, why he had pliers and a belt and climbers with him. Explain to the jury why he happened to have these with him all the time.

A. **WELL, HERE IS WHY HE HAD THOSE—ANYTHING THAT COULD HAPPEN TO ME, OR ANYTHING THAT HE MIGHT BE ABLE TO HELP ME OFF, OR SOMETHING LIKE THAT. NOT THAT I WAS AFRAID OF ANYTHING, BUT IT WAS JUST THE IDEA OF HAVING A MAN ALONG THAT KNEW HOW.**

Witness C. A. Buxton (Defendant's General Electrician) Page 268:

Q. Did you know that day, or did you know that this boy was up on those poles?

A. No, sir, I didn't know that he ever was on the poles. So far as my knowing, I don't know that he got burned on the pole only from what—

Q. Just what they have told you?

A. Just wht they have told me.

Q. Of course you believe it?

A. Yes, sir, there is no doubt about it.

Q. You didn't know he was professing to go up these poles?

A. No, sir, I didn't know he had any intention of going up the poles.

Q. For these purposes?

A. For these purposes.

Q. Did you ever give him a pair of climbers?

A. I gave him the privilege of a pair of climbers and insisted he should take them.

Q. What for?

A. So in case Harry Harbert got hung up—our lineman—Johnnie would be there to render the same assistance that Harry did to Johnnie.

Q. You knew that he could climb poles, did you, when you hired him?

A. That is why I hired him; because when Johnnie asked me for the job, it was down town, and Johnnie was working for Mr. Betts at the time on the hill, and when Johnnie spoke to me, I says, "Yes, Johnnie, I thought of you, you being able to climb, why, there, will be a chance for you," and I says "Have you got a pair of hooks?" He says, "Yes." "Well," I says, "I have got a pair down there that you can use, but the probabilities are you would rather use your own rather than use strange hooks, and I would like for you to have a pair along with

you, so that if anything happens to Harry, you will be able to get up and down the stick, and you had better have your own hooks," meaning that if anything happened to Harry—Harry Harbert, our lineman—if he should get burned or hung up, as we call it, why Johnnie would be there, would have hooks, so that he could get up to help him.

Q. Did you know that Johnnie had ever tried to tie any wires on those insulators?

A. No, sir.

Q. You didn't know it at the time, did you?

A. No, sir.

Q. Didn't hire him for that purpose?

A. No, sir.

Q. What did you hire him for?

A. I hired him to do ground work as a helper, and it was understood that that was what he was for.

Referring to the testimony of John L. Bisher, Jr., that Mr. Buxton had instructed **US** (meaning himself and Harry Harbert) how to make the ties at the insulators, this witness says (Page 269 et sec.):

Q. Now, did you ever instruct him—you heard his testimony about your showing him how to make a tie?

A. Yes, sir.

Q. Did that ever happen, Mr. Buxton?

A. Why, I never did show Johnnie. I remember of showing Harry how to make the tie, and if Johnnie why if he was there and asked any questions, I would have no doubt but what I answered them.

Q. You were always glad to inform him if he wanted to know anything?

A. Always; because I never know anything so well as after I have told somebody else.

Q. So that if he did get any talk from you, it was just as a matter of information? Was that it?

A. Yes, sir.

Q. You were not instructing him about any duty then?

A. Not that he had to perform.

Witness Robert N. Betts (Receiver and Defendant), Page 319:

Q. Did anyone ever tell you, Mr. Betts, or did you know, that Johnnie Bisher was purporting to work up on a line like that?

A. No, I did not.

Q. You knew that he was a bright boy, and learning all he could, didn't you?

A. Yes, sir.

Supporting Harbert's clai mthat Bisher was on the pole watching him and trying to learn how to do the work, Witness Betts says (on cross-examination), Page 321:

Q. Did you ask him if he wanted any rubber gloves, or needed any?

A. No, sir.

Q. You didn't?

A. No, sir.

Q. Why didn't you?

A. Because I had no idea that he was going on the pole.

Q. No idea he was going on the pole?

A. No, sir.

Q. Why didn't you think he was going on the pole, Mr. Betts?

A. Because Mr. Buxton said to me, "I have a good man to change that pole line." I said, "Who is he?" He says, "It is a young man from the valley by the name of Harbert." I said, "That is good," and I thought that Mr. Harbert was going to fix that line.

Harry Harbert, defendant's lineman, claims that Johnnie Bisher was studying electricity and was trying to learn all he could, and therefore he climbed this pole and watched him. Concerning this particular point, Johnnie Bisher testifies as follows (Page 67):

Q. And you had seen Harbert work with these wires, right along, hadn't you?

A. Yes, sir.

Q. Were you studying electricity at that time?

A. Just had a little bit in school—physics.

Q. Naturally you wanted to find out all you could about it, didn't you?

A. I didn't want to find out there. I intended to go to an electrical school after.

Q. You have always wanted to be an electrician, haven't you?

A. Yes, sir.

Q. And of course, what you could find out, you wanted to learn as much as possible, didn't you?

A. I wanted to learn everything that I could.

This piece of testimony explains how it is that Johnnie Bisher says that Mr. Buxton, the General Electrician, showed **US** (Meaning himself and Harry Harbert) how to make the ties, when Buxton swears that he was simply showing Harbert, and if Bisher saw it, he was a volunteer.

Concerning this same thing, Harbert says (Page 162):

Q. Now, do you know what Johnnie was doing while he was up there on that pole?

A. Well, he was up there to see what I was doing. He wanted to learn the business, and I was showing him everything I could.

We submit the evidence on this point as clearly demonstrating, beyond any doubt, that Bisher was a volunteer on the pole, seeking information for himself, and not in the discharge of any duty.

The master had furnished him and also Harbert, whom he was assisting, with means of sending up the supplies to Harbert, which did not require Bisher to be on the pole in any way or at all.

Of course, if Bisher was a volunteer, he could not recover, under the following:

POINT V.

A volunteer assumes all risks of the place and cannot recover against the master for injuries except where they are wilfully or wantonly inflicted.

INSUFFICIENCY OF EVIDENCE (Continued)

Negligence Charged in the Complaint.

It is our contention that the evidence does not sustain any charges of negligence set forth in the complaint. These are as follows (Page 3, Allegation IV):

That the defendant unlawfully and negligently

1. Constructed and maintained the aforesaid transmission wires of dangerous voltage by failing to insulate the same at the poles and arms upon which they rested and where the employees of the defendants were liable to come in contact therewith;

2. Strung said dangerous voltage wires at an insufficient distance from the poles and supports to permit repairers to freely engage in their work.

3. Constructed, maintained and mingled dead wires strung upon the same support with said live wires;

4. Failed to designate the arms or supports bearing said live wires by color or other designation;

5. Failed to use any device, care or precaution to protect the safety of life and limb of the employees of the defendants in the use or repair of said dangerous voltage wires.

It is further charged, at Page 4, Allegation VII, that while the plaintiff was working for the defendants as a common laborer.

6. He was ignorant of the use of electricity and inexperienced in the art of construction of electric wires or electric currents and in handling wires charged with electricity;

7. That defendants, knowing that plaintiff was ignorant of the use of electricity and inexperienced in the art or construction of electric wires or electric currents and in the handling of wires charged with electricity, negligently and carelessly directed the plaintiff to assist a foreman of the defandants in placing insulators on said alternating currents of live wires at a place where they were defectively constructed and maintained;

And at Page 5, Allegation VIII, the charge is that defendants

8. Negligently and carelessly required the plaintiff, under direction of their foreman, to climb the poles sustaining said live wires, using climbers and without any ladder or other apparatus to sustain his weight; and

9. Require him to lift one of the wires; and

10. Negligently and carelessly failed to turn off the electric current from said live wires; and

11. Negligently and carelessly failed to provide any means to protect the plaintiff from being injured by said live wires.

And at Page 5, Allegation IX, it is charged that the plaintiff, while assisting the foreman,

12. Held the same (live wire) in his hand while the foreman was endeavoring to place an insulator on the arm carrying the same; and

13. While so holding said live wire, without any negligence on his part and without knowing that it

was dangerous so to do, the plaintiff received an electric shock.

These are all the charges of negligence contained in the complaint. We will examine them seriatum.

We desire the Court to bear in mind that the complaint does not state facts sufficient to constitute a cause of action, in this: it fails to allege when Bisher received the double contact or what caused him to receive it.

The evidence does not disclose how, or why, or when, or in what manner, or in the discharge of what duty, he became entangled in the wires. Therefore, the complaint is clearly insufficient.

POINT IX.

A complaint must show negligence of the defendant which is the proximate cause of the injury to plaintiff before the defendant can be mulcted in damages.

Proof and pleadings in Accident Cases, Sec. 138, page 140.

Coming down to the allegations of the complaint, none of of them are sustained by the evidence.
They are as follows:

We will consider charges 1, 2 and 13 together.

That the defendant unlawfully and negligently

1. (Page 3, Allegation IV). Constructed and maintained the transmission wires * * * * by failing to insulate the same at the poles and arms upon

which they rested and where the employees of the defendant were liable to come in contact therewith.

2. Strung said dangerous voltage wires at an insufficient distance from the poles and supports to permit repairers to freely engage in work.

13. While so holding said live wires, without any negligence on his part and without knowing it was dangerous so to do, the plaintiff received an electric shock.

There is no allegation that he received the shock by reason of the alleged defective construction of the line, nor does he at any place charge or attempt to show how or why he touched two wires at the same time.

But the question of the sufficiency and proper construction of this line is amply disclosed by all the evidence.

The particular cross arm is in evidence; was produced by the defendant, introduced (Pages 53-54) and marked Mutual Exhibit B-1 (Page 205) and is of the following size:

A. About four feet long (Page 51).

B. Carried three wires (Page 51).

C. There were four pegs on it (Page 54).

D. One peg never had an insulator on it (Page—).

E. These pegs were twelve inches from the center of one to the center of the other (Page 57).

It is shown that with this extra unused peg, the middle wire could be lifted from the peg on which it was stationed and lifted clear over the pole and clear

over, beyond the unused, or middle, or mean, pegs, thus leaving a clear space of **THIRTY** inches between the farthest wire and the inside wire as a working space (Record, page 67):

Q. Now, between these pegs, from the outer peg on either side of the pole, across the pole in the center and beyond the second peg from either end is a distance of 30 inches, is it not, approximately?

A. Just about.

The pole on which this cross arm rested was eight inches in diameter across the top.

Witness Bisher (Page 68):

Q. How large was this pole to which the cross arm was attached?

A. I think the top of it was about eight inches.

Witness Sloper (Plaintiff's expert) Pages 112-113:

Q. Here is an arm that is four feet in length. State to the jury whether that is a safe length of a cross arm for four pegs on it, with three wires?

A. Well, I would consider it very close.

Q. What do you mean by very close?

A. Between the wires.

Q. Between which wires?

A. Between all of them to be safe to work between.

Q. If it measures thirty inches from the post No. 3 to the end post on either side, with only three wires, leaving a thirty inch center, you call that a very close place to work?

A. **THIRTY INCHES IS THE REGULAR SPACE TO WORK BETWEEN.**

Q. Then it is not close, is it?

A. Those two wires isn't close. But the outside one is the one I have reference to.

Q. Suppose on this cross arm as it is before you, we should take the left hand end of it—there is a wire at the outer peg, and the next peg on the inside is 12-inch center, and suppose that a lineman should just lift that wire over that pole and leave it over the third peg, he would still have the thirty inches there, wouldn't he?

A. Yes, sir.

(Page 113).

Q. He wouldn't be crowded for space, would he?

A. No.

Q. Be plenty of room, wouldn't there?

A. Yes, ought to be.

Q. Be perfectly safe, wouldn't it?

A. Yes.

Q. So there could be no complaint made as to lack of space, could there?

A. There is thirty inches. That is the rule.

Witness Harbert (Defendant's lineman), Page 149:

Q. Referring to this specific line here, will you tell the jury—illustrate, just step down, please, to this arm, will you, Mr. Harbert, and stand facing the jury. (Witness comes down.) Now, we will say you are up on a pole.

A. Well, if I was on a pole, the first place I would be standing would be—a wire here and a wire here, a wire here—I have my arm over this wire, and do my work right here.

Q. In that 30 inch space?

A. In that 30 inch space. Here is the other wire over in here. I put my arm over this wire, and do whatever work I have to do.

Q. Crowded for room at all?

A. No, I don't see how I would be crowded. Plenty of room there with 30 inches.

Q. That is the regulation distance, isn't it?

A. Yes, I could swing out here as far as I wanted. If I didn't have enough room, I could swing out here two feet, if I wanted to, and work this wire here. But I should consider that is a fair distance anyhow. I don't need to.

Q. No danger of any induction from one wire to another, is there?

A. It would take about 200,000 volts to arc that far.

Q. To arc a foot?

A. Yes. It takes about 210,000.

Q. You never heard of arcing from one wire to another where there is thirty inches between?

A. No.

And at Page 151, same witness:

Q. Now, after you had finished on the outside wire over there, will you demonstrate to the jury how you would fix the inside wire?

A. Well, after that wire is finished there, standing here, the other wire is out there, I untie this wire and take it—of course I am down about this position —lift it, lay it over there, swing it over here somewhere, and go to work on this wire. The wire is on the other side of this plate.

Q. That gives you a thirty inch space again?

A. It gives me thirty inches, yes.

Q. Safe, is it?

A. I don't see how it can be otherwise, 18 inches across.

Q. Isn't that the customary way of handling such things as that?

A. Well, in this case it is, yes. It is a protection. It is not necessary. I could take and work four wires on there just as easy, but where there is only three wires, it might take a little extra precaution.

Q. So that with three wires on that four pin cross arm, you had more space than is customary?

A. Yes, it was a four pin cross arm.

Q. How far from centers to centers?

A. 12 inches, 18 inch in the middle, something like that.

Witness Myers (Defendant's expert), Page 205:

Q. How long is the standard cross-arm?

A. Generally call it a four pin cross-arm, twelve inches between arms.

Q. I will show you this cross-arm that we call Mutual Exhibit B-1, and ask you from your observation of that—we agree it is four feet?

MR. RICHARDSON: Four feet.

Q. Is that what you call a standard cross-arm?

A. It is generally the standard cross-arm, four pin arm.

(Witness examines cross-arm and says:)

A. Well, this pin looks as if it never had an insulator on it.

Q. That would be what you call three wire on that, wouldn't it?

A. Three wire, yes.

Q. Now, you see also where that has been up against the pole, don't you, Mr. Myers? I will ask you to kindly tell the jury whether or not it is a safe place, whether the wires are too close as you see those pins, too close for a lineman to work in safety if he is putting on new insulators?

A. No, it is not. The lineman can work and transfer his wires across there and keep in a safe place.

Q. Keep practically a thirty inch space to work in, can't he?

A. Yes, sir, all the time.

Witness F. A. Hull (Defendant's expert) Pages 223-224:

Q. Now, in constructing these lines, you became acquainted, did you not, with the general character of what they call a standard cross-arm?

A. Yes, what we call a standard cross arm, I have, yes.

Q. The cross-arm that I refer to is this one over here, Mutual Exhibit B-1, conceded to be four feet

in length. Is that the customary length of the standard cross-arm?

A. Yes, for that kind of a line, I think it would be.

Q. And you have examined that? You can see from where you are, whether the pegs are set about customarily? Is that right?

A. About 12 inches, yes.

Q. Now, I will show you some pictures, Mr. Hull. They are marked down at the bottom in lead pencil, C, D, and E, conceded to be pictures of this transmission line. Have you ever worked on transmission lines out in the country like that shows this to be?

A. Exactly the same kind.

Q. Where?

A. Chehalis, Kelso.

Q. How high a voltage was carried over the wires at those places where you worked?

A. We carried regular 2300 there. That is, that type of line carried 2300.

Pages 227-228:

Q. Now, with this standard arm, Mr. Hull, these pegs, the outer pegs, are twelve inch centers. The one across the middle I didn't measure, but the two outer ones are twelve inch centers, with three wires on there, with thirty inches from peg, skipping from one peg over to the other one, would you consider that too close, or plenty of space, or what would you, to work?

A. I would consider it a very safe line. I have worked in lots tighter places than that would be,

especially from what your pictures show, with only one cross-arm, a very safe line. In other words, I would consider it a snap as a lineman, to work on that kind of a line.

Witness Buxton (Defendant's Electrician), Page 260:

Q. I am talking about the distance it is when you can lift one and put it over, is 30 inches a good space to work in?

A. It is not cramped at all. It is a good space. There is nobody asks for more that I know of.

Q. That is as much as you ever heard given to a man, isn't it?

A. Well, I don't know as I ever heard of more or less, or anything different being asked for.

Q. Anyway, it is plenty of room in there when they take them and push them apart?

A. Yes, sir, there is no occasion for a short circuit. A man can watch himself so he will get along without any danger.

And at Page 284 (cross-examination):

Q. Now, you said that this was a standard gauge cross-arm, did you, Mr. Buxton?

A. Yes, sir.

Q. How do you know that it is a standard guage cross-arm?

A. Because it is what we used in the Coeur d'Alenes, and through the Big Bend. It is the same thing in this western country. Now, back east, we didn't use that same cross-arm.

Q. Now, what did you use back east?

A. We had a seven pin cross arm.

Q. Seven foot?

A. Seven pin. (etc.)

We submit the above evidence as totally disproving charges 1, 2 and 13, of the complaint. There is no evidence whatsoever to sustain these three charges.

COMPLAINT FURTHER CONSIDERED.

Charge 3, Page 3, Allegation IV.

The defendant is charged with having constructed, maintained and mingled dead wires strung upon the same support with the said live wires.

The eivdence discloses that on this same pole there were the three high tension transmission wires on this cross-arm, and that the only other wire on the pole was a telephone wire **SEVEN FEET BELOW.**

Witness Harry Harbert (Defendant's lineman), Page 201:

Q. Now, how far were those telephone wires from the cross-arm bearing and supporting the electric wires?

A. From the wire they are seven feet.

COURT: Seven feet below?

A. Yes.

Q. You are positive about that?

A. I measured it.

COURT: Seven feet below?

A. Seven feet below the wire.

Q. Below the cross-arm or the wire?

A. Below the wire.

Q. Seven feet below the wire?

A. Yes, sir.

Q. You measured that?

A. I measured that.

The above evidence is uncontradicted, and the testimony fails to show any claim that the alleged "dead wire" had any participation in the injuries. We submit, therefore, that charge 3 is wholly unsustained.

COMPLAINT FURTHER CONSIDERED.

Charge 4.

At Page 3, Allegation IV, the next charge is that the defendant "failed to designate the arms or supports bearing said live wires by color or other designation."

The General Laws of Oregon, 1911, Page 16, require "That (17) all arms or supports bearing live wires shall be specially designated by color or other designation which is instantly apparent, and live electric wires carrying a dangerous voltage shall be strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock."

The object or purpose of the color on the cross-arm is to inform the laborers of the presence of live wires.

But in this case it is conclusively shown that Johnnie Bisher actually knew and admitted that he

had knowledge, at all times, that these transmission wires were live and that he was cautioned not to touch two of them at the same time. If this is true, then the objects and purposes of all the paint and color on earth have been achieved, and it is not claimed that by reason of the absence of the color scheme that he touched live wires, mistaking them for dead ones.

Witness John L. Bisher, Jr., (Plaintiff), Page 61:

Q. You don't know how you were hurt?

A. I don't know how this came in contact, this hand at all.

Q. You do know that you had to touch two wires to get a shock, don't you?

A. That is what Mr. Buxton told me.

Q. They always told you not to touch two wires?

A. Yes, Mr. Buxton told me.

Q. You didn't have any duties that required you to touch two wires, did you, at the same time?

A. No, sir.

Q. You knew these wires were live, didn't you?

A. Yes, sir. He told me they were 2300 volts.

This bit of testimony shows not only the knowledge on the part of Johnnie Bisher but the caution on the part of the defendant and the negligence of the part of Bisher.

At Page 69:

Q. How long had you known that those wires carried that voltage. Did you know it every day you worked there?

A. Oh, I had known it ever since I had been in the country—I heard that.

Q. Of course you had known that electricity was very dangerous, haven't you?

A. Yes, sir.

At Page 86:

Q. You knew at all times when you were working there that 2300 volts was a very dangerous voltage, didn't you?

A. Mr. Buxton told me that if I shorted, it would kill me.

* * *

Q. But they did tell you that 2300 volts would kill you, didn't they?

A. Mr. Buxton, the man sitting there, told me if I shorted the wires, touched two at once—

Q. That is what you mean by shorting the wires?

A. Yes, sir.

Q. That is what you call a short circuit, isn't it?

A. Yes, sir.

Q. So, when speaking of it, you say short and shorted the wires.

A. He said if I would short the wires that it would kill me.

With this direct admission of knowledge on the part of the plaintiff, how can it be claimed that the failure to paint the cross-arms was the proximate cause of the injury?

We dismiss charge of negligence No. 4 as totally immaterial in this case.

COMPLAINT FURTHER CONSIDERED.

At Page 3, Allegation IV, it is also charged that the defendant failed to use any device, care or precaution to protect the safety of life and limb of the employees of the defendant in the use or repair of its dangerous voltage wires.

Also, at Page 4, Allegation VII, it is charged that the plaintiff

"Was ignorant of the use of electricity and inexperienced in the art or construction of electric wires or electric currents and in handling wires charged with electricity," and that the defendants, knowing of his ignorance, inexperience, etc., "directed the plaintiff to assist a foreman of the defendant in placing insulators on said alternating current of live wires at a place where they were defectively constructed and maintained.

We submit the above charge of the ignorance of plaintiff on the evidence quoted.

He knew that 2300 volts were on the wire; knew such voltage was dangerous; that a short circuit would kill him; he was cautioned not to touch two wires at the same time, and was told of the danger.

Charges 5, 6 and 8.

Charges 8, Page 5, Allegation VIII, is that the defendants "negligently and carelessly required the plaintiff, under the direction of their foreman, to climb the poles sustaining said live wires, using climbers and without any ladder or other apparatus to sustain his weight."

Thus, at charges 5, 6 and 8, the gravamen is that the defendant failed to supply the instrumentalities for work or protection.

It is said that the defendant failed to furnish the following instrumentalities:

A. Step-ladder.

We challenge the record to show any evidence that will sustain the use of any ladder of any kind or character in the work which was done.

The boys used the iron climbers instead, and this was uncontradicted.

B. Insulated nippers.

C. Climbers.

D. Straps to hold them to the pole.

E. Body protectors, or sow-bellies.

F. Rubber gloves.

Thus on charges 5, 6 and 8, the gravamen is that the defendants failed to supply the instrumentalities for work or protection.

It is stated that the defendants failed to furnish the following instrumentalities:

A. Step ladder.

We challenge the record to show any evidence that will sustain the use of any ladder of any kind or character in the work which was done. The workmen used the iron climbers instead, and this is undisputed.

B. Insulated nippers or pliers.

C. Straps to hold the workmen to the poles.

D. Body protectors, or sow-bellies.

E. Rubber gloves.

We shall consider these instrumentalities, and their relation bearing upon the injuries separately. We shall discuss this phase of the matter, bearing in mind the well-known rule, **that in negligence or failure of duty of the master, is material in no case unless it is the approximate cause of the injury.**

A. Step ladder.

We dismiss the charge as wholly unsustained and frivolous.

B. Insulated nippers.

Although great stress is laid upon the failure to supply insulated nippers, and much evidence, pro and con, was given at the trial, the Plaintiff says:

Page 49.

Q. Did they furnish you with any tools?

A. Well, Mr. Harbert, Harry Harbert, gave me a pair of climbers and a belt and a pair of pliers.

Q. The pliers, did they have insulated handles?

A. No, sir, the pair of pliers he gave me, they were **dull,** and the climbers were **dull,** and I sent down home and got a pair I had used in climbing telephone poles, they were sharp, and the pliers and the belt—I wore the belt that he gave me. And the pliers, I sent down home and got a pair of pliers, because those that he gave me were old, and I couldn't use them, and they were so large I couldn't hardly use them.

Q. Did you try to use the climbers that he gave you?

A. I climbed one pole with them.

Q. Why couldn't you use them?

A. They were too dull. You cannot use climbers when they are very dull, you might slip. I climbed the pole right in front of the store when we was putting the lights in the saloon.

MR. SMITH: We move to strike out all this testimony about the climbers and the belt and the pliers, for the reason that there is no risk alleged to have been occasioned by them at all. It simply encumbers the record.

COURT: I understand they allege that he was not supplied with the proper utensils.

MR. RICHARDS: That is it, your Honor.

MR. SMITH: But if your Honor please, there is no charge he was hurt by reason of it. His charge is he was hurt by electric shock. He doesn't claim they had anything to do with the shock.

COURT: I will overrule the objection.

MR. SMITH: Note an exception.

This evidence shows that Johnnie Bisher supplied himself with **suitable** pliers and climbers, and it is not claimed the belt was defective.

The evidence does not show that the absence of any of these instrumentalities so far considered have anything to do with the injury. Witness Johnnie Bisher, page 61.

Q. You don't know how you were hurt?

A. I don't know how this came in contact, this hand at all. See evidence heretofore quoted.

Page 68.

Q. Now, at the time you were hurt, you had on climbers, didn't you?

A. Yes, sir.

Q. These sharp peg things that you climb with?

A. Yes, sir.

Q. And you had on a big strong belt?

A. Yes, sir.

Q. You say those were your own climbers?

A. My climbers.

Q. And they were sharp?

A. They were sharp, yes, sir.

Q. So your feet didn't slip, did they?

A. No, sir.

Q. And your belt didn't slip?

A. No, sir.

Page 71.

Q. Now, you spoke of a conversation with Mr. Buxton? Did he ever give you any climbers.

A. Mr. Buxton?

Q. Yes.

A. No, sir.

Q. Did he ever tell you that it might become necessary for you to climb a pole?

A. He told me just to help Harbert.

Q. Well, now, will you kindly answer my question? Did Mr. Buxton ever tell you that you might have to climb the pole?

A. No, sir.

Page 89.

Q. Concerning these pliers, you were not using pliers when you were hurt, were you?

A. I did just a little before.

Q. At the time you were hurt, you were not working with pliers, were you?

A. No, sir, I just started to lift up the wire.

Q. And the pliers that were used there by Harbert didn't have any insulated handles, or anything of that kind, did they?

A. No, sir.

Q. So you were not hurt by reason of the pliers?

A. No, sir.

We further lay out the following charges:

B. Failure to furnish insulated nippers.

C. Straps to hold to the pole

because no injury arose from either source.

This leaves for consideration, the following instrumentalities:

D. Body protectors or sow-bellies.

E. Rubber gloves.

Looking to the evidence on these two instrumentalities, we find:

BODY PROTECTORS (SOW-BELLIES).

Witness Johnnie Bisher, page 89.

Q. And at one time also you spoke of a pad, or

a protection, I believe you called it a belly pad, that men sometimes use?

A. I didn't say anything about a belly pad.

Q. Well, it was brought out in the opening statement. Do you know where they use those pads, and under what circumstances?

A. No, never heard of a belly pad.

Q. You know they don't use them out in that transmission work out there, where there are only three wires up there, don't you?

A. I never seen any to know what they were.

Q. And you were not hurt by reason of not having a pad in front of your body? It was your arms that came in contact with the wire?

A. Yes, sir.

We take it that this answer lays out of the case, the question of the body protector. This then leaves for consideration, the last point, to-wit:

Witness Sloper (Plaintiff's expert), page 121:

Q. Suppose a case like this, Mr. Sloper: That here is this cross-arm four feet long. Here is the outside wire in place, wired down to this insulator; a similar one on the other end; and they are working on the middle wire—how would they use that thing then?

A. Lay that over the middle wire, and take the outside one off and put on the other insulator, put it up, tie it in, and take the sow-belly off.

Q. No, the outside wires are already fixed, and they are working at the middle wire?

A. They wouldn't need the sow-belly then.

Q. Exactly. That is all.

THE FAILURE TO SUPPLY RUBBER GLOVES.

Concerning this point, the evidence is as follows: Witness Betts, page 319 (Defendant).

Q. Did anyone ever tell you, Mr. Betts, or did you know that Johnnie Bisher was purporting to work up on a line like that?

A. No, I did not.

* * * * *

Q. Did you have materials there, or would you have furnished any man up there rubber gloves, if he had asked for them, or wanted them?

A. I would. I asked Harbert if he wanted them. He said no, that he would rather not use them.

Witness (page 321) states that he offered Harbert rubber gloves because he wanted to protect him as much as possible from shock, and says:

Q. How came you to suggest rubber gloves?

A. Why, because I thought it might help him. I knew that rubber gloves were made.

Witness says that he had none, but he knew that they were sometimes used, and says:

Q. Did you ask him (Bisher) if he wanted any rubber gloves, or needed any?

A. No, sir.

Q. You didn't?

A. No, sir.

Q. Why didn't you?

A. Because I had no idea that he was going on the pole.

Q. No idea he was going on the pole?

A. No, sir.

Q. Why didn't you think he was going on the pole, Mr. Betts?

A. Because Mr. Buxton said to me, "I have a good man to change that pole line." I said, "Who is he?" He says, "It is a young man from the valley by the name of Harbert." I said, "That is good," and I thought that Mr. Harbert was going to fix that line.

Witness Buxton. (Defendant's electrician, age 35, 11 years' experience, electrician last six or seven years).

Page 264.

Q. Would you work at that work in the latter part of July, in that section of the country up there, that arid or semi-arid belt, would you work on this putting in of insulators with rubber gloves?

A. No, sir, they could not. It would take more than a small raise in salary for me to be bothered with them, and suffer the heat that you would get off them, up in that country at that time of the year, off rubber gloves.

Q. Make your hands sweaty, would they?

A. Why, they would get sore. They would not only sweat, but they would be so tender that they would be sore with rubber gloves.

Witness continues, stating that in climbing the

poles, etc., with rubber gloves, the splinters would puncture and tear the gloves and it would then be worse than nothing, he says:

Q. Now would you consider rubber gloves a safety protection up in work of this kind, or would they be necessary at all at that time of the year.

A. I would say that they would not be necessary, and it is like this: If a man had a job there that he considered a little bit close, something like that, there would be one point of protection—that would be one point of protection.

Q. That is where he is liable to catch two wires by the hand—something of that kind?

A. Yes, sir.

Q. Where he has lots of room in there, there is no use of it?

A. In that kind of construction, a man don't want them that I know of.

Page 273, witness says:

Q. Now, was there any work that Johnnie was required to do there, or that you knew he was doing, that required any rubber gloves, or any wrapped or insulated pliers, or any sow-belly, or anything of that kind?

A. . There was nothing that I knew of that he was doing that would require anything of the kind, and if I had suggested that he have rubber gloves, or anything of the kind, why, no doubt in the world but what he would have turned it down.

Page 281.

Q. Now, what does a lineman wear rubber gloves for?

A. Well, in case that they get cramped into a cramped place, where they don't have to work, don't have a chance to guard themselves, and it is almost impossible for them to get through without touching one side or the other, or very small chances for them to get through, they will wear rubber gloves.

Witness Frank Hull (Defendant's electrician, age 28 years, 9 years' experience).

Page 225.

Q. What is the highest voltage you have handled on bare wires?

A. The highest voltage that I have ever handled has been 2800-2500.

Q. You used rubber gloves, did you?

A. No.

Q. You handled that amount with your bare hands?

A. Yes. I have used rubber gloves, of course, but that was under certain conditions.

Q. What were the conditions?

A. While we would be working on a junction pole, or if it was raining real hard and everything was wet, we had to go into it at night, I would take gloves when I couldn't see, on shooting trouble.

Page 230 (Johnnie Bisher was doing the work of a grunt).

Q. Now, you have worked enough around lines to

know what the boy is kept for, the ground man, the grunt, as you call him. Is there any duty that he is performing that requires him to get up on that pole?

A. No, there is no duty. If he is a grunt, he has no business up the pole.

Q. Do they furnish grunts with rubber gloves?

A. No.

Page 234.

Q. Now, you stated, Mr. Hull, that you had worked with gloves—you had used gloves?

A. Yes, I have used gloves.

Q. What did you use the gloves for?

A. Well, if at night, I would go on a pole that had a great many wires, or raining or wet, I would use the gloves if it was dark.

Q. What did you use the gloves for? What was the object in using them?

A. Well, they are more or less protection.

Q. It is insulation, Mr. Hull, isn't it?

A. Rubber is an insulation, yes, sir.

Q. If you have rubber gloves, and they are in good condition, you can handle live wires without incurring the same dangers that you would if you didn't have the gloves?

A. Yes, sir, they would be of some assistance.

Witness F. E. Myers (Defendant's expert, age 38, electrical engineer, 23 years' experience).

Page 207.

A. Well, on that pole line, I don't see what use he could make of rubber gloves there, because he is

up on a pole there, and nothing else around him but three wires. I do not see the necessity for using rubber gloves.

* * * * *

Q. Now, you state that you wouldn't use rubber gloves if you were a lineman up there?

A. No, I would not.

Page 208.

Q. With that condition, with those poles about 25 feet to the cross-arm—is that correct, gentlemen?

MR. RICHARDSON: Yes.

Q. Twenty-five approximately—it may be a foot less, but about that—would you see any use to which a lineman would put rubber gloves to work out there, if he was given them, putting on insulators and changing them?

A. No, I don't think he would in that warm weather.

Q. Why wouldn't you want rubber gloves?

A. Perspiring of the hands cannot deceive me on account of a puncture in the cloth.

Q. You try to keep your hands dry?

A. Yes.

Page 219.

Q. Now, it is customary, Mr. Myers, for electric linemen to use rubber gloves?

A. Well, some do and some don't.

Page 220. Witness says that he worked eight years ago for the Portland Railway, Light & Power Company, and says:

A. No, they didn't furnish no gloves in those times.

Q. And didn't require the employees to use gloves at this time?

A. They left that to the discretion of the lineman. If he wished to use gloves, why he did.

Q. Is there a practical, experienced lineman without rubber gloves now?

A. Why, I don't see any of them wearing them.

Witness then named William Castleman as a practical lineman, working for the Portland Railway, Light & Power Company, who works without rubber gloves, and says:

Page 221.

Q. What kind of work?

A. He does any kind of work on the lines, handling from 2300 volts up for them.

Q. And he doesn't use rubber gloves?

A. I have never seen him use rubber gloves yet.

Q. Did he tell you that he didn't use them?

A. I can see him with my own eyes when I see him working.

Witness W. H. Harbert (Defendant's lineman, age 26, electrician, experience seven years, p. 145).

Page 156.

Q. Now, you heard some testimony here about rubber gloves?

A. Yes, sir.

Q. Did you ever work with them?

A. No.

Q. I am scared of them.

Q. Tell the jury why.

A. Well (pgs. 156-167), a man might put a pair of rubber gloves on, come up a pole, and you would puncture them, take hold of the wires, why, it would be the same as having a bare hand, if there was any kind of holes in them at all—if there was any contact, if you had the contact. With one wire there is no contact—12,000 volts is just as easily handled as 2300. I handled 7000 volts just a little while before I came down here; damp weather, too—snow and cold. But if you take the gloves, and slivers in the poles, or anything like that cut the gloves, a man might take chances with them, you know, thinking they were safe.

Q. Do they make your hands sweat?

A. They are considered a death trap with most linemen; that is, hot wire men.

Q. You are what they call a hot wire man?

A. Yes, sir.

Q. Did this company up there ever direct your attention to the gloves?

A. Yes, sir, Mr. Betts asked me if I wanted rubber gloves.

Q. What did you tell him?

A. I told him no.

Q. You were the lineman, the only lineman there, were you, at that time?

A. Yes, that is what I hired out for.

Q. You say you didn't use these gloves?

A. No, sir.

Page 174.

Q. Did you ever hear of a helper using rubber gloves?

A. Never did.

* * * * *

Q. Do they furnish the helper—is he exposed in any way to any danger in his duty on the ground just carrying the material?

A. No.

Page 188.

Q. Did you say anything to him when he got up to the top?

A. I think it was on that very pole—I wouldn't swear to it—that I cautioned him about the wires.

Witness L. H. Kennedy (Plaintiff's expert, electrical worker, 7 years' experience, 4½ years lineman, p. 121).

Page 122.

Q. Now for repair men to make repairs on a line of that kind (referring to the line in question), what would be considered by practical and experienced linemen as being the proper tools and appliances to work with, to make repairs and change insulators?

A. Well, I would consider the sow-belly and a pair of rubber gloves the most essential; also insulated pliers; but then I would insist on the sow-belly, and a pair of rubber gloves, or I would not work on it.

Page 124.

Q. What is the custom of the average employer of requiring linemen to use rubber gloves?

A. In the last three years, they have all forced me to **TAKE** rubber gloves or not work.

* * * * *

A. (Page 125) It is the custom to require them to use rubber gloves, to accept rubber gloves. **IT IS THEIR OPTION AS TO USING THEM.**

Q. Even in working on transmission lines that are insulated?

A. Yes, sir.

Witness L. W. Sloper (Plaintiff's expert, claims 11 years' experience). Page 104, witness says that he has handled 2300 volts, but not higher.

Q. (Page 105 I will ask you, Mr. Sloper, if a three-phase transmission line, such as has been described by the witness in this case that you have heard, consisting of copper wires a little larger than a lead pencil, strung upon poles about 25 feet from the ground and on a support known as a cross-arm, such as the one in evidence here, said transmission lines being the distance as you observe between these two insulators on this Exhibit "B-1" of both plaintiff and defendant, the cross-arm being nailed to a post about eight inches in diameter, and the third wire being placed on an insulator on this end of the cross-arm, would it be in your opinion, safe for a repair man or any one else to make repairs, or to change these insulators, on uninsulated wires carrying a

voltage of electricity as high as 2300 volts? State whether or not in your opinion, a workman or repair man, without the use of rubber gloves, without the use of insulated handles on pliers, or any other lineman protectors, could make those changes without endangering themselves to great injury and shock by electricity?

MR. SMITH: Objected to as invading the province of the jury, and as incompetent.

* * * * *

A. I should consider it very dangerous.

Q. Explain to the jury why you would consider it dangerous.

A. Well, the lineman's pliers are nine inches long, in the first place, and when he unwraps the wire off the insulator, he does it with his pliers, especially if he has on rubber gloves, which we always have in handling that kind of voltage, and unwrapping that, the pliers nine inches long, and the wire unwraps three inches, as he is unwrapping it around he is liable to hit his hand on the other side, in the first place.

Q. What are the customary tools and appliances that an electric lineman in working upon a power line that I have described, in which the wires are uninsulated, what are the customary tools and appliances that a lineman will use?

A. He first has his pliers insulated, and the company always furnishes rubber gloves, and in a job like that he should have what they call a sow-belly. It is about four feet long, made of heavy rubber,

tested to 60,000 volts. The first thing he does is to put that sow-belly on the middle wire. Then he can learn over and work on the outside wire with safety, and change that insulator; and then take his sow-belly off and change the inside one, and then turn around and change the other one.

ARGUMENT.

Witness Sloper (Plaintiff's expert), page 121:

Q. Suppose a case like this, Mr. Sloper: That here is this cross-arm four feet long. Here is the outside wire in place, wired down to this insulator; a similar one on the other end; and they are working on the middle wire—how would they use that thing then?

A. Lay that over the middle wire, and take the outside one off and put on the other insulator, put it up, tie it in, and take the sow-belly off.

Q. No, the outside wires are already fixed, and they are working at the middle wire?

A. They wouldn't need the sow-belly then.

Q. Exactly. That is all.

Cross Examination, page 110.

Q. How long have you been in the electrical business?

A. About eleven years.

Q. What have you been doing?

A. Lineman.

Q. What school are you a graduate of?

A. I didn't graduate from any school.

Q. No, I thought so. Did you ever do anything else except work as a lineman?

A. Yes, sir.

Q. What?

A. I worked on a farm.

Q. From the farm you went to this electrical work?

A. Yes, sir.

Q. That is all you know about it?

A. That is all I know about it, is the general work of a lineman, that is all.

Q. (Page 112) Suppose at the time a man is hurt, he is not using his pliers, and he couldn't use his pliers on the work he is doing, the fact that the pliers are wrapped wouldn't save him, would it?

A. No.

* * * * *

Q. Where are you working now?

A. I am not employed at the present time.

Q. How long since you have had employment?

A. A couple of months.

Q. Where did you work as lineman when you quit?

A. Bellingham, Washington.

Q. For what company?

A. Bellingham and Snoqualmie—Stone & Webster.

Q. Did you work as lineman on electric transmission line, or telephone line?

A. Transmission line.

Q. How long did you work there?

A. About two weeks.

Page 113.

Q. Do you know any of the electricians of this city?

A. Yes, sir.

Q. Any of the men in charge of affairs?

A. Yes, sir.

Q. What is the highest voltage you know they can handle when they are handling it alone?

A. Twenty-three hundred is the highest they handle, take any man with any sense. When he handles any more than that he is taking great risks of life.

Q. Why?

A. Well, because you cannot tell what it is going to do.

* * * * *

Page 115.

Q. You take a dry pole in the latter part of July, on a cross-arm like you see this is, a man on the pole away from the ground 25 feet, it would be perfectly safe to touch one of those 2300 volts with one hand, wouldn't it?

A. No, sir.

Q. Suppose they have done it without injury, would that be any proof to you?

A. He might do it for a month and then he might get hurt.

Q. Because of his carelessness?

A. He couldn't help it. I have got shocked in

very dry weather, when I have been handling it for a long time. Then I would take hold of it, and it knocked me pretty near off the pole.

Q. You would handle it safely 99 out of a hundred?

A. I have handled it, but it was dangerous to do it.

Q. Handle it safely 999 times out of a thousand, wouldn't you?

A. No, sir, not that big a percentage.

Q. How do you account for the shock when things are in perfect condition, with a dry pole, dry cross-arm, in the middle of summer?

A. You cannot tell when the pole is always dry. It is liable to be wet. You think it is dry, and it ain't.

Q. It is because the pole was wet and you didn't know it you got shocked?

A. Yes, sir.

Q. Then you didn't answer the question, whether or not it wasn't safe to handle it with a dry pole?

A. If the pole is absolutely dry, and you know it is dry, and you cannot tell.

Q. Suppose it is dry and you don't know it?

A. If it is dry, **YOU ARE ALL RIGHT.**

Q. (Page 117) You say the company has always furnished rubber gloves?

A. Yes.

Q. How big gloves?

A. How big?

Q. Yes; how far up do they come?

A. They have long cuffs on them. Come up about there, I think.

Q. Gauntlet gloves?

A. Yes, here is a pair of them.

Q. What effect do they have on your hand when you work?

A. Well, they are clumsy to handle.

Q. Hands sweat, do they?

A. On a very hot day they do a little.

Q. What company furnishes those gloves, do you know?

A. All of them do.

Q. Do they furnish them to boys that are required to work on the ground and carry material from pole to pole?

A. If they have got any wires to handle, they do.

Q. Well, will you answer the question? If they carry materials from pole to pole, do they furnish them for that?

A. No, not to carry material with.

Page 119.

Q. Isn't it highly probable—not only possible, but highly probable, and oftentimes—that a man short-circuits by taking hold of a live wire when he is simply touching nothing, except his feet are holding onto the post, with his climbers stuck into the post?

MR. SMITH: Objected to. This man is an expert. That is not the fact in this case at all. It is admitted that the boy touched the other wire. He has admitted that himself.

MR. RICHARDSON: No, your Honor, I beg your pardon—I have not heard any one admitting it. There has no one particularly denied it. The boy says he doesn't know. There is no evidence to show whether he touched the other wire. My theory is he shorted in, he threw both hands up, and he came in contact with both wires, it is a cinch. But what I mean is, he could have gotten a shock by short-circuiting with the post and holding one wire. That is probable. My theory is that the plaintiff received his injuries by striking two wires. That is the impression. But the question I am asking is to show that it is probable, from this expert witness, that he could get a shock from that matter.

COURT: I think that is outside of this inquiry if that is your theory about the question.

The above testimony shows conclusively:

A. That even in case they furnish rubber gloves it is optional with the workmen whether they use them.

B. That rubber gloves are not necessary in the work which is being done.

C. That no duty which the grunt does calls for rubber gloves.

At the time of the injury, Bisher says that he was lifting the middle wire with one hand, and fails to account for his other hand. The other witness, Harbert, says that he was not lifting the wire; that his left arm was thrown over the outer wire, and he (Bisher) was watching him (Harbert) working, and trying to learn all he could.

But the evidence shows conclusively that Bisher touched two live wires at the same time; and it is inconceivable for any electrician to have a duty that requires him to touch two live wires at the same time.

The evidence, therefore, shows that Bisher was not in the discharge of his duty when he touched the two wires, and it fails to show that if he had been furnished rubber gloves, he would have escaped injury, or that he would have used them and that they would have protected him.

AVOIDING INJURY—AN ABSOLUTELY SAFE WAY KNOWN TO BISHER.

Bisher was experienced in climbing telephone poles; he knew that the wires were highly charged; had been warned not to touch them.

He knew that work could be done there in safety, by supporting himself as follows:

A. With one wire and not touching the other.

or—

B. With his arm resting on the dry wooden Cross-arm and not touching any wire at all.

At the time he was hurt, there was a distance between the outer right hand wire and the middle wire, of 30 inches, in which he could have placed his body and supported himself by holding on to the pole and the cross-arm, and been absolutely safe.

If, therefore, his duties did not require him to touch the two wires, and if further, he did touch two live wires, we say that the deduction is irresistable

that he was hurt through his own negligence and being at a position where his duties did not call him, he cannot recover. He was a mere volunteer, and he cannot recover.

CHARGES OF NEGLIGENCE — COMPLAINT FURTHER CONSIDERED.

The remaining charges of negligence are, page four, allegation seven, point—

> 7. That the Defendant, knowing Plaintiff's ignorance, required him to work among these wires, etc. That the wires were defectively constructed, etc.
>
> 9. Required him to lift one of the wires.
>
> 10. Negligently and carelessly failed to turn off the current from the live wires.
>
> 12. And further that the defendants failed to insulate the wires.

We have shown Bisher's knowledge of the situation, that he knew the very day he was working there, and long prior thereto, that these wires were carrying a high dangerous voltage, concerning which he had been cautioned.

That he was an experienced climber of poles, that his duties were on the ground, that he was given climbing instrumentalities so that he could help Harbert out in case Harbert got in trouble.

We will now consider the remaining charge of negligence, etc.

UNINSULATED TRANSMISSION WIRES.

It is claimed throughout this case that it was the duty of the Defendant to insulate these 2300 volt transmission wires.

This charge is based upon the alleged statutory duty in the General Laws of Oregon, 1911, pages 16 and 17.

The latter part of paragraph 1, reads: "All owners, contractors, sub-contractors and other persons having charge of, or responsible for any work involving a risk or danger to the employees or the public, shall use every device, care and protection, **which it is practicable to use,** for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine, or other apparatus or device, and without regard to the additional cost of suitable material or safety appliances or devices."

Commenting upon this law, the Court instructed the jury (Record 346): "If you believe from the evidence it was not practicable for the employer to insulate the wires at the place of the happening of the injury, and if you further believe that the weather insulation spoken of was not practicable to use at that place, then I instruct you that the law does not require a vain or useless thing to be done. All statutes must be read and construed and applied to human affairs by the rule of reason, and the duties which are imposed upon masters by what is known as the Employers' Liability Law of Oregon, are such

duties and obligations as can be performed reasonably and efficiently, and no obligation is laid upon the master to place upon his business an expense in furnishing appliances which are prohibitory either by the extreme cost or frequent renewals, which by the frequency of the renewal of such appliances would compel the employer to close his enterprise. If you therefore believe that it was not practicable for the employer to insulate the wires and keep them insulated as against shock at the place of the injury, then I instruct you as a matter of law, that it was not the duty of the employer to attempt to insulate the wires with weather insulation and you cannot consider his failure to so insulate the wires and keep them insulated, as negligence.

"You must take into consideration in this connection, gentlemen of the jury, whether or not the defendant could have insulated these wires as required by the statute and still continued his business. It it was too expensive to do that—if the expense laid upon the business by the insulation was such that the party must go out of business, or that it would render his occupation unprofitable, so that he could not operate, then you must determine from all the facts in the case whether or not he used due care and precaution—the utmost care and precaution, you might say in this case—in doing what he did do in the premises in the placing of these wires and leaving them uninsulated."

The verdict of the jury was against the Defendant. It is our contention that the verdict is against the

instruction given, based upon the evidence in the case, which is as follows—

There was introduced in evidence a small bit of copper wire, covered with weather insulation. It was claimed by the plaintiff that the wires in the country should have been placed in with this weather insulation. Now, weather insulation is defined by Plaintiff's witness, Sloper, as follows:

(Page 107.)

Q. Now, Mr. Sloper, is it practical to insulate wires carrying a voltage of 2300 volts?

A. **Yes, sir, they are always insulated.** The pole and the wire being dry, if they had been insulated there would have been no danger of any accident.

Q. If the wires had been insulated in this case, there would not have been any accident?

A. No.

Q. If it had been good insulation?

A. Yes.

Q. Would insulating the wire have any tendency to decrease the efficiency of the plant.

A. No, sir.

Cross examination, page 107.

Q. What kind of insulation have you ever seen on a cross-country wire of 2300 volts, up in the mountains?

A. The regular insulation that they put on wires of that voltage.

Q. What is it made of?

A. It is made of cotton and tar solution made up.

Q. What you call weather insulation, isn't it?

A. What we call weatherproof, yes.

Q. That is all there is to it? It is weatherproof, isn't it?

A. It is called insulation.

Q. It simply protects the wire from inclemency of the weather, isn't that it?

A. And from the handling of it.

Q. And it is no protection whatever against handling a live wire, is it?

A. It certainly is, yes, sir.

Q. What protection?

A. If it is dry, it is absolutely safe.

Q. Do you mean to swear as an expert, that you can insulate wire carrying 2300 volts with weather insulation?

A. Yes, sir.

Q. Do you know of a single wire in the United States where it is done so as to be a protection against shock?

A. I know of where it is always done.

Q. Where?

A. In Portland and other places.

Q. What do the high tension wires that come into this city carry?

A. Ten, fifteen, twenty and sixty thousand.

Q. Clear up to 60,000. Do you know of a single 60,000 wire across the country that is carrying 60,000 voltage that is weather insulated?

A. They don't handle anything as high as that.

Q. Will you answer the question? Do you know of a single transmission wire carrying 60,000 volts, that is insulated with weather insulation, coming into this city?

A. They don't insulate high voltage wires.

Q. The higher the voltage the better it is to leave the insulation off, isn't?

A. Well, that high it wouldn't do any good; it would burn off, it is too hot.

Q. Isn't it the fact that higher the voltage the more they leave off the insulation?

A. When you get above 2300, it is, yes.

Q. Why does 2300 happen to be your limit?

A. That is as high as they generally insulate.

Q. With this weather insulation?

A. With any kind of insulation that I know of.

Q. (Page 110) But do you mean to testify that that light weather insulation of cotton and a little tar there, is to protect men that come in contact with the wires?

A. I don't know what else it is put on the wire for if it ain't for that.

Q. (Page 116) You mean that wires that carry 2300 volts—let us see if we cannot get away from that—wires that come from that transmission wire, come into the houses, that service wire—what does it carry?

A. Some carry 11,000.

Q. That come into private residences?

A. Oh, 110 and 220.

Q. 110 and 220. That is the way they measure it in this city, isn't it?

A. Yes, sir.

Q. That is the standard under which this city is limited—three phase system, at 110 and 220?

A. Yes, sir.

Q. Those wires are weather insulated, aren't they?

A. Yes, sir.

Q. Did you ever know anybody to get shocked with that light weather insulation?

A. Yes, I have on 220.

Q. So weather insulation doesn't protect against a shock, does it?

A. Not with the insulation, I never knew them to get shocked—I didn't—no, not through the insulation they didn't.

It was established that there was a special ordinance requiring insulation in Portland, and before that time, the insulation was not used. This part will be explained later. The witness Sloper testifies:

(Page 128.)

Q. Do you know where a cross country wire is that uses the insulation?

A. Yes, sir, I do.

Q. Where?

A. Walla Walla.

Q. Over the country?

A. Running down from the plant, down Mill Creek Station down into Walla Walla.

Q. The same type and grade?

A. The same type and grade. I would not say it was there now. It was there, though.

Q. How long ago?

A. About three or four years ago.

Q. Well, now, don't you know that the modern way of handling these transmission high tension wires is to leave them uninsulated, cross country wires?

A. What we call high tension wires is high voltage wires—2300 volts always—2300 always is insulated.

Q. Always insulated?

A. Yes, sir.

Q. Do you know where the line is from here to Salem?

A. No.

Q. Salem, Oregon. Do you know where the line is around the vicinity of Pasco and Kennewick in Washington?

A. No, sir.

Q. Do you know where the line is from Yakima down to Prosser?

A. No, sir.

Q. Do you know the wires in Spokane, Washington?

A. Yes, sir.

Q. Are they insulated that way?

A. They didn't used to be when I was there.

Q. When was that?

A. It has been about eight years ago.

Q. Were you working at the business then?

A. Yes, sir.

Q. And you say they didn't insulate them that way then, did they?

A. No, sir.

Q. And you say this Walla Walla one was four years ago when you recall that?

A. Yes, sir.

Q. Do you know a transmission line that runs to Lewiston, Idaho, Genese, and around there? Do you know the Pomeroy plant?

A. No, sir.

Q. Do you know the plant at Baker City in this State?

A. No, sir.

Q. Do you know the plant of any small towns in this State, ranging from 5,000 to 15,000 inhabitants, or any of the surrounding country? Do you know what kind they use at Medford?

A. No, sir; I have been in California the last three years.

Q. What part?

A. Los Angeles.

Q. Underground wires?

A. In the main part of town, yes.

Q. You don't know whether in the cross country transmission wires in this state—you can't name one where they use that kind of insulation, can you?

A. I don't know of any 2300 volt transmission lines now today.

Q. Do you know of any 229 line that uses it?

A. No, sir, I don't.

Q. Do you know of any 301 that uses it?

A. It don't know anything under 10,000.

Q. How long would that weather insulation last?

A. Three or four years—five.

Q. Now you say that you know that that is plain weather insulation from the fact there is no rubber surrounding the wire?

A. That is called weather proof.

Q. Didn't you testify that you knew that from the fact there was no rubber surrounding the wire?

A. Yes, sir, I did.

Q. If there were rubber there it would be a better protection against electricity than it is, wouldn't it?

A. Supposed to be, yes.

Q. If that weather insulation you talk so much about happened to be a little old, it would be a deception and a snare? It wouldn't be any protection at all, would it?

A. It would be some protection. Your coat sleeve would be some protection.

Q. It would be about as much protection as your coat sleeve, too, wouldn't it?

A. If a man happened to hit his hand with that, and didn't get against the wire, it would protect him.

Q. If he didn't strike the wire, he wouldn't get shocked at all, would he?

A. If the insulation was very wet, he would get shocked if he just touched the insulation.

Witness L. H. Kennedy (Plaintiff's expert) testifying as to the particular weather proof wire in evidence, page 126.

(Page 123.)

Q. Have you with you any pieces of insulation of copper wires?

A. I have.

Q. What do you call that, Mr. Kennedy? (Referring to piece producer.)

A. That is wheather proof, triple braid, No. 1, copper solid.

Q. Is it practical to insulate an electrical wire carrying 2300 volts.

A. It is.

Q. Is that used in the City of Portland on all transmission lines carrying 2300 volts?

A. Well, that is used, the same thing—

MR. SMITH: Now, will you kindly answer the question, please.

A. A weather proof wire is used in Portland, triple braid.

Q. And you call this a triple braid, weather proof wire?

A. I do.

Q. In your opinion, if these transmission wires that have been described by the witnesses in the trial of this case would have been insulated according to this insulation, would there have been any injury?

A. There could not have been.

Q. Do you know of any other known and used insulation, that, if it had been used and had been in good repair on the same transmission system, would there have been any injury?

A. Nothing that is practically different, materially different; different insulation, but materially the same for outside work.

Cross examination, page 125.

Q. Do you know, are you familiar with the transmission lines of the City of Portland, carrying 2300 volts of electricity.

A. Well, not; no, sir.

On cross-examination the witness states that he has worked in Portland two years and a half on inside insulation, and further testifies:

Q. That was where you got this, wasn't it?

A. No, sir.

Q. (Page 126) Where did you get it, then?

A. Outside.

Q. Outside of what?

A. Outside work.

Q. Outside work?

A. Here on the Portland Railway, Light & Power Company.

Q. What I am asking you, is where did you get this?

A. I got that from the supply house.

Q. You did not take it as a part of the thing you saw in use, did you?

A. No, sir.

Q. And you know that that is used on the inside of the power house, where men are exposed to the machines right along, don't you?

A. That is used on the outside.

Q. Answer the question. Isn't this the inside insulation that they use right around the generating machinery all the time and around the transformers?

A. I think not.

Q. Do you know.

A. Not that I know of.

Q. Do you know of a single transmission line in this country where they use that on a cross country line?

A. I don't know about cross country lines.

DEFENDANT'S WITNESSES ON INSULATION.

Witness Harbert (electrician), page 146:

Q. Those high voltage wires up there, were they insulated or not?

A. No—bare copper.

Q. Now, from your experience as a lineman, what will you say is the proper way as to a cross country high voltage wire, to insulate it with weather insulation or leave it bare?

A. I wouldn't have much to do with it with insulation on. That is, I would touch it more carefully than if it was bare. I prefer bare wire myself. I haven't heard in my life of a transmission line using insulated wire, and I have seen a few of them.

Q. Tell us where you have seen them?

A. Out from Portland here to Cascade Locks, all the ways along you will notice high tension line, bare copper, about No. 2, carrying about 6600 volts, I judge from the insulation, but nothing less than that. And also from Eugene to Albany, and most any of these transmission lines out of Portland here, you will find the bare copper.

Q. Why is it you prefer bare copper to this weather insulation?

A. Well, because weather insulation is good for a few months. After rain, and the dry weather, this insulation punctures. A man will take the chance with it that he would not on bare copper.

Q. It would be a deception to him, wouldn't it?

A. Yes, I should consider it dangerous.

Q. Isn't it a fact that, in your business, this weather insulation is regarded as much more dangerous than the bare wire for that reason?

A. Yes, it is regarded that way.

Q. You are always on guard on a bare wire, aren't you?

A. Yes, sir.

Q. And the weather insulation, it is impossible for you to tell whether it is good or bad—isn't that it?

A. No, you cannot tell. That is the proposition.

Q. (Page 148.) They don't use it out in cross country like this?

A. Not on high tension. The telephone company uses it in the city sometimes.

Q. (Page 149.) How many times have you handled bare wires on poles?

A. Oh, I guess on and off, seven years. I think that was about the first work I ever did.

Q. (Page 159.) How long have you worked on wires where three of them were strung on cross-arms like that? Tell the jury please.

A. I worked up there, I worked on it all the time the last eight months on this one particular job; that is, different times. I worked on it steady most of the summer. I do work on the line now. It is higher voltage, of course. We have 6000 volts on the line now.

Q. They have stepped it up to 6000, have they?

A. Yes, sir.

Q. Running over the same size wire?

A. Yes, sir.

Q. You handle these wires, 6600, the same way, do you?

A. Certainly.

Q. Any more danger with the 6600 than with the 2300?

A. Not a bit.

Q. Is it possible for you to get a shock with just one contact?

A. No, not unless the voltage gets away out of sight. Take 12,000, anything up to 12,000 volts, there is no need to worry.

On page 166, witness says relative to doing work of insulation and tying the wires, in the manner

which they did on this transmission line, and with the porcelain insulators used on the pegs:

A. I would have to cut clear through to the copper, make the tie whole. You cannot tie it with insulated wire. You have to use iron wire to tie it. And you would have to cut right through the insulation and hit the copper.

Q. The first thing you would have to do would be to remove the insulation, wouldn't it?

A. I would just squeeze the wire right through the insulation.

Q. Well, now, isn't it also true that when the weather insulation is broken once thereafter the rain or the snow or the weather conditions affect it very materially, and it deteriorates quite rapidly?

A. Yes, it deteriorates rapidly after a puncture. After the first puncture, why, it will deteriorate very fast after that.

Q. Do you know what the average life of weather insulation is, as against the weather?

A. Well, I should judge, I couldn't say for sure, but between three and six months.

A. That is as to the weather itself?

A. Yes.

Q. Well, now what would be the practicability of any company keeping its wires insulated with new weather insulation?

A. Well, if they had to insulate their wires every time that the wire punctured, they would have to

construct a new line every few months; that is, to keep it guaranteed to be insulated.

Q. Would that be practicable for any company?

A. I shouldn't think so.

Why not?

A. . Why, the expense. You would have to shut down. You cannot put a new wire in unless you use a double pole line.

Witness testifies on cross-examination (pages 177-178) as to his experience with handling from 2300 to 6000 volts on bare copper, and says (page 181):

Q. Have you seen any lines of the Portland Railway, Light & Power Company in the City of Portland that were not insulated, that carried 2300 volts?

A. Right outside of Portland here, from Portland to Cascade Locks it goes.

Q. I am speaking of the lines, Mr. Harbert, that carry 2300 volts in the corporate limits of the City of Portland.

A. I cannot swear that I have, inside the city limits.

Thereupon (on pages 182 and 183) in a colloquy between the Court and Counsel, the Court ruled that the City of Portland should be excluded in considering this matter, because it was stated to be under ordinance.

On page 182, the witness testifies:

COURT: I understand you to say that you have seen no lines inside of the city that were not insulated.

A. Well, outside, I saw that were insulated the transmission lines.

COURT: I understand that outside they are not insulated. Inside they are insulated.

A. Yes, that is correct.

COURT: That is what I understood you to say.

A. Yes.

COURT: I think that is enough.

On pages 183, 184 and 185 the witness testifies further and reiterates that the outside cross country lines carrying 2300 volts, are uninsulated.

On pages 198 to 201, pictures are identified of this identical line, and on page 200, witness says:

Q. Now Defendant's Exhibit "E," which one is that?

A. Well, that is myself up on the 6600 volt line. That is before I took that cross-arm off.

Q. On the same pole?

A. The same pole.

Witness Myers (electrician), pages 203-204):

Q. Did you work where the lines were bare, carrying 2300 volts?

A. Yes, sir, I have put on some insulators between Chehalis and Centralia. They had 2300 volts on their line there before they changed it.

Q. Did they use their wires bare, transmission wires?

A. They did at that time.

Q. Do you know what weather insulation is?

A. I do.

Q. Will you state to the jury what it is for and what it is?

A. Well, it is to afford a certain protection, usually against swinging short, or anything like that; but an electrical man doesn't consider it a safe protection for life or limb, as I don't think there is any manufacturer of weather proof wire will guarantee the wire up to any standard voltage.

Q. You say there is no one that will do it?

A. No, I don't think any of them will do it. In fact, they have no test tag on those wires.

Q. (pg. 204) You say the men do not consider it is safe, that is, the weather insulation?

A. Not practical lineman, no.

Q. What about the comparison as to which they think is better to work with, bare wire or wire that has got this stuff on it?

A. Well, I couldn't say about usual linemen, but I myself prefer to work with the bare wire.

Q. Why?

A. Because I am not deceived on insulation.

Q. How will the weather insulation deceive a lineman?

A. It is in various ways. Some times the deterioration of the insulation qualities of the insulation, and then there may be punctures in it, especially where you have it tied around the pin.

Q. Now, is it practicable for any company to keep their outside transmission cross country high volt-

age wires, say 2300—that seems to be the magic number in this case,—2300 volts, or 6000 volts, or 1000 volts, is it practicable for them to keep those transmission wires insulated with weather insulation so that it will protect against shock?

A. Well, on, after it has been up six months or a year, after the elements has worked on the line.

Q. It would break up any company to try to keep that stuff new, wouldn't it?

A. Yes, to keep it new, it would.

Q. (pg. 211) What is the highest voltage you handle without rubber gloves?

A. 10,000.

Q. So you know it can be done and is done right along?

A. Between 10,000 and 11,000. When I worked for the Portland General Electrical Company that was our high line coming in.

Q. You call 2300 volts high wire, or not?

A. In my estimation, I would call it very safe.

Q. Although 2300 volts will produce instant death?

A. Just as quick as 10,000 or 20,000.

(Page 211, Witness shown plaintiff's exhibit. 2)

Q. Now, you speak of weather insulation. I will show you this piece of insulated wire which is marked "Plaintiff's Exhibit 2" which they claim is weather insulated.

A. It looks like a piece of triple braid weatherproof wire.

Q. Now I will also show you this wire which I now have, that we will ask to have introduced. Will you tell what kind of insulation is on that?

A. That is what we call single braid rubber covered wire.

Q. What is the difference between single braid rubber covered wire and triple weather proof?

The witness then shows that the single braid rubber covered wire is much more safe than weather insulated, and says

Q. (212) Is there any such rubber protection on the weather insulation?

A. No, there is not; not what we call weather proof wire.

Witness then says that the smaller wire is used in residences, etc.

Q. (pg. 213) Will weather insulation protect against the electricity leaking through, or shocking or burning in wood, if it was in contact?

A. Well, it all depends on whether it was in a wet place or a perfectly dry place. More danger in a damp place than it is in a perfectly dry place.

Q. What is the voltage of the little wire that you have in your hand?

A. That small rubber-covered wire is tested and guaranteed to withstand 600 volts.

Q. You say there is no manufacturer that will test or guarantee their weather insulation?

A. Weather proof wire, no.

Q. Now, you have seen a number of cross country wires, haven't you, Mr. Myers?

A. I have, yes.

Q. Carrying 2300 volts or more. Do you know whether they are frequently left without any covering at all—just bare wire?

A. Well, there are a few—now, there is some lines up in Washington and Oregon, corporation's lines, running between Chehalis and Centralia, was 2300 volt line, bare line. But at the present date they have stepped it up to 22,000 volts.

Q. Do they insulate that?

A. No, that is bare.

Q. That is more dangerous than 2300 isn't it?

A. Yes, well, the reason why they use bare wire on high tension is the simple reason that there is no insulation that will withstand.

On page 216, Witness testifies that 2300 volt wires in the City of Portland are insulated under ordinance.

Q. They use that for the purpose of guarding the public in case a line falls on the street, or should strike another line? That is one object of the insulation, isn't it?

A. Yes, sir.

Q. It is more expensive, isn't it Mr. Myers?

A. It is a little more expensive. That is one of the objects.

Q. And you consider it safer, do you not, if it is insulated?

A. No, I do not.

Page 217, Witness tells of the reason of the extra cost, because in buying insulated wire, you have to pay the same for the insulation that you do for the wire.

Q. (Page 218) Well, you know that transmission on lines carrying 2300 volts in the City of Portland are insulated, don't you?

A. Yes, because there is a city ordinance to that effect, to insulate them.

On page 221, Witness names Wm. Castleman as a lineman working for the P. R. L. & P. Co., of Portland, who works with his bare hands on 2300 volt wire.

Q. (Page 222) But that is weather insulation like the one you hold in your hand.

A. I won't say it was like this. It may have been double weather proof.

Q. You never saw him working without gloves on naked wire, did you, uninsulated wire?

A. Only on occasions when he would make a connection, that is, practically.

Q. Well, I mean on an uninsulated copper transmission wire.

A. It would be impossible for him in the City of Portland to do it.

Q. I say, did you ever see him working on an uninsulated transmission line carrying as high as 2300 volts?

A. No.

Frank A. Hull (Defendants Expert.)

Q. (page 225) Now, you know what weather insulation is, don't you?

A. Yes.

Q. Isn't it a fact that if you have one of these cross country high voltage wires and you have to tie the wire into these insulators in the pegs, that you have to cut the insulation for the wire to make the tie?

A. Well, you don't have to cut it off, but in making the tie you surely destroy the worth of the insulation anyway—tie it tight enough to stay.

Q. That would expose the workman right there then, anyway, wouldn't it, the very nature of the work he is doing?

A. Oh, yes, he is exposed all the time.

Q. Makes the wire just the same as if it was not insulated, wouldn't it?

A. Yes, just the same.

Q. Have you ever worked with bare wires on these transmission lines?

A. Yes, sir.

Q. What is the highest voltage which you have handled on bare wires?

A. The highest voltage that I have ever handled has been 2800—2500.

Q. (page 224) How high a voltage was carried over the wires at the places where you worked?

A. We carried regular 2300 there. That is, that type of line carried 2300.

* * *

Q. Have you noticed whether these cross country high voltage wires—we will speak of 2300 volts as high voltage—whether those cross country high voltage wires, have you noticed whether they are insulated or not?

A. Some of them are insulated, and some of them are not.

And in answer to the question of where he has worked, witness says:—

A. Chehalis, Kelso.

Q. (page 232) Will you tell us, Mr. Hull, where there are some transmission lines that you know of, carrying a voltage of 2300 where they use the bare wires across the country?

A. There is one at Kelso. There was one on the Kalama River that carried 6600. That was all bare wire. I believe it is yet. I know that it is—that is all bare wire. It carried 6600. There is one in Chehalis, between Chehalis and Centralia.

Q. You constructed a line in Alaska, I believe?

A. Yes, I constructed a plant in Alaska.

On page 233, the witness states that the Chehalis and Castle Rock Line carried 22000 volts, but that there was a 2300 temporary cut in on the line, which he had done work on. He says that the transmission line on this line was 2300 volts, (234) and says

Q. Now is it necessary to destroy the insulation in tying an insulator on a wire that carries 2300 volts like this?

A. Is it necessary to destroy it?

Q. Yes.

A. No it is not necessary.

Q. Is it necesary to destroy the insulation?

A. It is not necessary, but nine linemen out of ten will do it.

Q. Nine linemen out of ten will do it?

A. Certainly.

Q. (page 235) It would not be necessary to destroy it in order to fasten it substantially on an insulator?

A. Well, it might with No. 10 wire. You might have to cinch it up tight to hold. It would eat into the insulation. You cannot twist a wire around another and twist it up tight to hold anything without destroying the insulation more or less.

Q. (page 236) About how long is the life of the insulation of that kind?

A. That is all according to the climate.

Q. In a dry climate, how would it be?

A. In a dry climate, if it was put up in the summer time, it would last quite a while.

Q. Last a year or two?

A. No, no. It would never last a year in the summer, not a whole year in this country.

Q. In a dry climate, I mean.

A. I don't think it would in a dry climate.

Q. (pages 236-237) What do the Company do when they find the insulation is no good?

A. They don't do anything. They couldn't tear the lines down and built it up again.

Q. They couldn't?

A. Well, they could if they made a business of spending their money doing it.

Q. (page 238) Taking a system as described here carrying 2300 volts, Mr. Hull, you don't mean to say that if the wires had been insulated and the insulation had been in good repair and condition, would the accident then have happened?

A. Well, I cannot say. I don't know how long the wire was there. If the insulation had been perfect, of course, the accident would not have happened.

ReDirect Examination, (page 238).

Q. Is it practicable to maintain one of those cross country voltage wires like this, with perfect insultation?

A. No, sir.

Q. Or with perfect weather insulation?

A. No, sir.

Q. There is not a plant in the United States of which you have any knowledge that does that, is there?

A. No, sir.

Q. It would break them up, wouldn't it?

A. Yes, sir.

Q. Have to change their wires so often, wouldn't they?

A. Yes, sir.

On page 239, telling of the effect, which tying this insulated wire has, the witness says,

Q. And no doubt that would destroy the efficiency of the insulation, wouldn't it?

A. To a certain extent, yes.

Q. So that the work they were doing would of itself have destroyed the efficiency of the insulation to a large per cent?

A. Yes, sir.

Witness C. F. Buxton (Defendant's electrician) (page 261)

Q. From your experience as a lineman, will you state—these wires were uncovered over there, weren't they, uninsulated?

A. Yes, sir.

Q. No weather insulation?

A. No weather insulation. All the insulation there was, was the glass on the pin.

Q. That is the insulator to keep them off the wood? Is that it?

A. Yes that is it.

Q. To keep them from growling in damp weather?

A. Yes, sir.

Q. Will you state to the jury whether that bare wire is a safe way of handling the current through it, or whether it should have weather insulation? Which do you regard the safer, and why?

A. I regard the bare the safest of the two, because a man knows what he has got. He is not going to take a chance on some insulation on that he don't know whether it is impoverished through weather, or through making a tie upon it, being cut, or anything of that kind. He is not taking any chances on that.

Q. What you call weather insulation is not insulation against a shock then, is it?

A. Why, not at all. A man don't consider it, when he is working on a line carrying 2300 volts, insulation for protection.

Q. (page 262) Then, that weather insulation is not a protection against shock at all?

A. It is not considered a protection, and I wouldn't take it as a protection.

On pages 262 and 263 Witness names places in the Big Bend Country around Spokane and Coeur d'Alenes where the 2300 volt cross country transmission lines are all bare, and says

Q. (page 263) Now, isn't it true that in those countries, the greater part of the cross country lines that carry 2300 volts are bare?

A. Yes, sir, the greater part of them are bare.

On page 267, the witness states that 6600 volt wire is considered more dangerous than 2300, and says:

Q. What is the highest—what is the hottest wire you have ever handled, bare handed?

A. 6000.

Q. (pg. 274-275) You regard it as a safe method of work for a man to work lifting this 2300 volt wire back and forth, if he doesn't touch any other wire?

A. It is positively safe under the conditions of the weather and general conditions at this time.

On Cross Examination (page 277) the witness is shown Plaintiff's Exhibit, and says:

Q. What size is that copper wire?

A. I would say No. 4, looking at it from my general observation, I would say it was size No. 4.

Q. (278) Now, it is more expensive than the naked wire, isn't it, Mr. Buxton?

A. More expensive per foot, yes sir.

Q. (pg. 279) Now what is the object of insulation?

A. A matter of protection.

Q. A matter of protection?

A. Yes, sir.

* * * * * *

Q. Now, if the plaintiff, Johnnie Bisher, would have come in contact with a wire properly insulated as this is insulated here, would there have been any accident?

A. As that is insulated there, there wouldn't have been any accident.

Q. If it had been defective, or if it had been broken, or old and worn, or rotten and decayed, it would have been dangerous almost as much as if it was naked wire, wouldn't it?

A. It would have been more so, because they would probably have taken a chance where being naked they wouldn't.

Q. (page 280) Now isn't there another object of insulation, that if a wire is insulated, if it comes in contact with another wire in case of a storm, or if the tie wire should break and it should drop down on the pole, if it is insulated, there is no danger, is there?

A. Yes, there is.

Q. What danger would there be if the insulation is good insulation? I am speaking of not defective insulation, but I am speaking of insulation.

A. (pg. 281) Well, we will understand as good insulation as that there insulation as it stands right now is good insulation for weather proof?

Q. Yes.

A. But in case that is should be wet and drop down onto that cross-arm—

Q. And the cross-arm was wet?

A. And the cross-arm was wet, with 2300 volts, there would be danger of a ground.

Q. There would be danger of a ground.

A. Yes, sir.

On ReDirect Examination, (page 287) The witness says:

Q. How long would weather insulation last in a perfect condition?

A. A short time.

Q. (page 288) The first rain does it up, doesn't it, for that purpose?

A. A man doesn't want to take any chances on it after it has been out there, after the first rain, we will say.

Q. Now, would it be practicable for any electric light company, operating a cross country transmission line, to keep its wires perfectly insulated with weather insulation? Is it possible for them?

A. It is not possible, and there is no way—there is no law or anything of the kind that could make them keep it in first-class insulation.

Q. Bankrupt any company to do it, wouldn't it?

A. They would never start at all. Yes, it would break any company.

The above evidence that it is impossible to keep transmission cross country 2300 volt wires insulated as against shock, is uncontradicted.

The evidence to the effect that the insulation would be broken by tying the wire over the porcelain knobs on the pegs, is uncontradicted.

The evidence that when the insulation is once broken, its efficiency is gone, is uncontradicted.

The evidence that it would bankrupt any company to attempt to keep its cross country transmission lines insulated with weather proofing so as to protect against shock, is uncontradicted.

This testimony, covered by the instruction which the Court gave to the jury, as heretofore quoted, clearly demonstrates that the verdict of the jury is against the instructions of the Court and is not supported by the evidence.

SUFFICIENCY OF EVIDENCE.

POINTS AND AUTHORITIES.

And we take it, the error in over-ruling the motion for non-suit, as well as for directed verdict, as well as for new trial, on ground of insufficiency of evidence, is always a question of law.

We further insist that the evidence in this case fails to make out a cause of action in favor of the plaintiff, for the following reasons,

First, the evidence fails to show:

A That the proximate cause of the injury was the negligence of the plaintiff.

B What was the cause of the injury.

C That plaintiff's negligence was not the approximate cause.

D That he was discharging any duty that required him to touch two wires at the same time.

The evidence does conclusively show:

A That the plaintiff could not have received a shock without touching two wires at the same time.

B That he did touch two wires at the same time.

C That no duty required him to do this.

D That in touching the two wires at the same time he did so carelessly and negligently.

E That his injuries were a result of his own carelessness and negligent act.

F That he was a volunteer, in so working as to touch two wires at the same time.

G That the duties for which he was employed were to work down on the ground, and did not require him to mount poles for the purpose of working among the live wires.

H That in working on the ground he did not require any protecting instrumentalities.

I That he did not require any rubber gloves,

or insulated pliers, or sow-belly, or climbers, or ladders, or any other instrumentalities.

J That Harbert was not a foreman, nor in charge of the work.

The evidence conclusively shows that he was hired principally for the reason that he already knew how to climb wires and poles; that he was experienced in climbing, and that he was given climbers and a belt, so that he could help Harry Harbert, if Harry Harbert got in trouble.

The pliers were given to him, so that he could cut the tie wires in proper lengths on the ground.

The lineman was furnished with a sack and a rope, by means of which he could haul up the tie wires and the insulators from the ground without asking Johnnie Bisher to do any work on the poles.

It is further conclusively shown by evidence that is not denied, that Johnnie Bisher had worked there before, and knew of the dangers and had been cautioned on numerous occasions the year before, as well as at the time he was here.

On page 274, Witness Buxton says:

Q. Had he worked there before?

A. Not on the line; but the year before I made some taps up in the mill, and Johnnie helped me, out of this 2300. And we worked between this 2300 and some light wires, on a scaffold, the light wires was right behind us carrying 110, and I cautioned him to be very cautious and guard them too, as if he should touch one of them and me, it would be no bet-

ter than touching the two at 2300, and I cautioned him very cautiously for to not touch me while I was busy there.

INSUFFICIENCY OF THE EVIDENCE TO SUSTAIN ANY ALLEGATION OF THE COMPLAINT.

From the summary of the evidence quoted, we respectfully submit that none of the charges of negligence set forth in the complaint are sustained. We discuss them seriatem:

(Page 3, Allegation 4. Charge 1.) That the defendant unlawfully and negligently constructed and maintained its transmission wires of dangerous voltage, by failing to insulate the same at the poles and arms on which they were rested, and where the employees of the defendant were liable to come in contact therewith.

The evidence shows:

A That this line was of the three-phase system.

B The cross-arms were of standard size.

C No defect is complained of in the poles.

D Bare wires are safer than insulated wires.

E Insulated wires are impracticable and extremely expensive.

F They would bankrupt any company to maintain them in condition to resist shock.

Charge of negligence No. 2, (Page 3, Allegation 4,) It is charged that the defendant unlawfully and

negligently strung said dangerous voltage wires at an insufficient distance from the poles and supports to permit repairers to freely engage in work.

The evidence shows the direct contrary to be true, and shows:

A That there was a 30 inch space provided for by the arrangement of the three-phase system of the cross-arm.

B That 30 inches is ample for any man to work in.

C That the cross-arm was of standard size.

D That it was properly attached to the pole.

E No complaint is made that it was rotten or damp or insufficient in any way.

F The method and manner of lifting the wire over the pole so as to provide a 30 inch space, is common, customary and usual.

Charge of negligence number 3, (Page 3, Allegation 4,) That the defendant, "constructed, maintained and mingled dead wires on the same supports with live wires.

The only dead wires shown in the case, was the telephone wire which was seven feet below.

The testimony shows that 210,000 volts are required to arc one foot. That no arc greater than one foot has ever been known in electrical work, and the charge that this dead wire, seven feet distant, was mingled with live wires, is absolutely false and untrue.

Charge of negligence number 4, (Page 3, Allegation 4) It is said that the defendant, "Failed to designate the arms or supports bearing said live wires by a color, or other designation."

The object of this color, or designation, would be to charge an employee with notice, but in this case, it is admitted that Johnnie Bisher was working as a grunt, and that live wires were 25 feet above the ground.

He also admits that he knew at all times that he worked there and had positive knowledge even before he worked there, that these wires were dangerous; they they were live; that they carried 2300 volts; that he had been cautioned time and again that if he touched two of them, or "shorted" one, as he calls it, it meant instant death.

Besides, the record clearly shows that he was cautioned by Mr. Buxton time and again, on the year before, to-wit in 1911, (see page 274) of the danger of touching live wires, and Harry Harbert says, and his testimony is not denied, that he cautioned Johnnie Bisher on the day that he was hurt, and Harbert thinks on the identical pole, and this is not denied.

With all this notice and knowledge that these transmission wires were live, and with no charge in the complaint that the injury was caused by failure to paint the cross-arms, or by any color scheme, how can this be alleged as an approximate cause of the injury?

Charge of negligence number 5 (Page 3, Allega-

tion 4,) It is further claimed that the defendant "Failed to use any device, care or precaution, to protect the safety of life and limb of the employees of the defendant in the use or repair of said dangerous voltage wires."

It is further asserted that the defendant did not furnish sufficient instrumentalities; and it is claimed that he should have furnished,

A Rubber Gloves
B Insulated Pliers
C Strong Belt
D Body Protector (Sow belly)
E Ladders
F Climbers

Johnnie Bisher admits that he was not hurt by reason of the pliers, nor by reason of the climbers, nor by reason of the belt. There is no evidence to show that ladders are used, and the only instrumentalities he claims the defendant should have furnished, that might in any probability figure into the cause, are

Rubber Gloves and Body Protectors

It is admitted by Bisher, and by his expert, and shown by the witnesses that the body protector could not possibly have been used in the work which he alleges he was doing at the time he was injured.

The two outer wires had been fixed; the one inner wire was being adjusted, and the body protector is only used when it is necessary to lean over one wire in order to adjust another close to it, and when working in close quarters.

Then this brings us to the rubber gloves. The testimony concerning this has been discussed. The employer did not know that Johnnie Bisher was on the pole, or that he intended to work among the wires, and he was doing no work which required any protecting instrumentalities.

On he other hand, the duties of Johnnie Bisher are admitted and shown to have been working on the ground, out of danger, and it is conceded by everyone, that the discharge of the duties for which he was employed, did not require gloves or any other protecting instrumentalities.

In addition, Johnnie Bisher does not say that he was hurt by reason of not having rubber gloves or other instrumentalities. He says that he does not know how he was hurt, and certain it is, that no duty of his, or of any electrician, requires him to touch two live wires at the same time.

Charge of negligence number 6, (Page 4, Allegation 7) It is charged that Johnnie Bisher was ignorant of the use of electricity and inexperienced, etc., and argued that the defendants, with knowledge thereof, directed him to assist in placing insulators and negligently and carelessly failed to turn off the electric current on said live wires. These charges cover **Allegation 4, page 7,** and part of **Allegation 5, page 8,** and **Specifications numbered 6, 7 and 10.**

There is nothing to sustain this, whatsoever. Johnnie Bisher was not ignorant, he knew. The emplower did not order him among the wires, he went there of his own volition. No one requested, directed

or told him to touch two wires at the same time—he was specifically cautioned time and time again, not to do so.

He knew that the current was on. He knew that men worked at adjusting insulators when the current was on, and that such was the ordinary way of doing the work. His charges in these particulars are totally unsustained.

Charge of negligence 8, (Allegation 5, page 8) It is further charged that the defendant negligently and carelessly required the plaintiff, under the direction of their foreman, to climb a pole, using climbers, and without ladders or other apparatus to sustain his weight.

No lineman ever carries a ladder. Ladders are not furnished under any circumstances. There is no evidence to sustain the presumption that they are. Bisher had climbers of his own selection. He admits that they were sharp, and that he was not hurt by reason of his climbers, and this charge, therefore, fails.

Charge of negligence 9, (Allegation 5, Page 8.) It is charged that the defendant "Required him to lift one of the wires, etc." He was not hurt by reason of lifting one wire. He was hurt because he carelessly, negligently and recklessly got tangled in two wires.

The evidence is ample to show that one 2300 volt wire will not hurt anybody, under the dry conditions that prevailed in that country in July 1912, and that it is perfectly safe to work with one 2300 volt wire without rubber gloves, by lifting it from pole to pole.

In fact, if Johnie Bisher's evidence is to be believed, he had done this numbers of times before in safety, as he claims he and Harbert worked there before, and Harbert certainly did the work thereafter in safety in the same manner, as he completed the entire line alone without injury, and when the line was constructed it was done without injury. The record shows that this injury to Johnnie Bisher is the only one that ever happened at this plant.

Charge of negligence 11, (Allegation 8, Page 5) It is charged that the defendant negligently and carelessly failed to provide any means to protect plaintiff from being injured by the live wires.

The evidence on this point has been thoroughly gone into. Johnnie Bisher does not claim he was injured by reason of the absence of any instrumentalities. He does not show that all of the instrumentalities herein set forth, would have kept him from putting his arms against both the wires in the manner which he did, nor does any witness swear that with rubber gloves and weather insulated wire he could have touched two 2300 volt wire with safety.

Nor does he show that any duty, even as a lineman, or in any capacity, required him to get in contact with two live wires at the same time.

Nor does he swear that he would have used rubber gloves, had they been provided.

Charge of negligence 12, (Page 5, Allegation 9, It is stated that the defendant, Johnnie Bisher, held the live wire in his hand while the foreman was endeav-

oring to place an insulator on the line carrying the same.

There is no duty that requires this. He should have lifted the wire over the pole. Certainly Harbert did not ask him to hold the wire in his hand while Harbert adjusted the insulator.

If Bisher's testimony as to what work he did is true, he knew he was not required to stand on that pole and hold the wire in his hand. He knew that the wire should be lifted over the pole, thus creating the 30 inch space referred to, and it was a physical impossibility for him to receive a shock from this one wire while he was standing on a dry pole in July, 1913. The laws of physics, the testimony of the witnesses, the history of electrical shock, is that it always requires a double contact, and hence the one wire is insufficient.

Charge of negligence 13, (Page 5, Allegation 9) It is said that while he was holding this live wire, without any negligence on his part **and without knowing it was dangerous so to do,** plaintiff received an electric shock, but what caused him to receive a shock, the plaintiff does not state. He knew that he could not have received it from one wire. The laws of nature refute his claim that he could, and he cannot account for the double contact he received, as no duty required him to make it.

It is, therefore, apparent that he was hurt through his own negligence, and that none of the charges of his complaint are sustained.

We respectfully submit that the evidence is totally insufficient to show any liability of the defendant to the plaintiff for his injuries, and where there is no evidence, to show the negligence of the master as the proximate cause, the error of the Court in not directing the verdict is plain.

Patton vs. Texas & Pac. Ry. Co. 179 vs. 658; Bk 45 L. 361.

If our analysis of this evidence is correct, then it is plain that the Court erred in over-ruling our motion for non suit; in over-ruling the notion for a directed verdict; and in refusing to give instructions,

Number 1 (page 384)

Number 2 (page 384)

Number 3 (page 385)

Number 4 (page385)

Number 6 (page 386)

Number 7 (page 386)

Number 9 (page 387)

Number 10 (page 387)

Number 11 (page 388)

Number 12 (page 388)

Number 13, in manner and form requested by the defendant and also erred in submitting the case to the jury in any manner whatsoever. For all of these reasons, we submit that the case should be reversed and the error dismissed.

In conclusion, we respectfully apologize for the length of this brief, but the importance to the elec-

trical industry of the State of Oregon, as well as to the appellant, has compelled us, we feel, to be explicit in our statements in support of the charges of error; with the feeling that we are aiding rather than retarding the Court in its investigation.

Respectfully submitted,

EMMETT CALLAHAN,
SMITH & LITTLEFIELD,
Attorneys for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals

NINTH CIRCUIT.

ROBERT M. BETTS, Receiver of The Cornucopia Mines Company of Oregon, a Corporation,
Plaintiff in Error.

vs.

JOHN L. BISHER, Jr., by JOHN L. BISHER, his Guardian ad Litem,
Defendant in Error.

Brief of Defendant in Error.

Upon Writ of Error From the District Court of the United States for the District of Oregon.

STATEMENT OF THE CASE.

I.

On the 5th day of December, 1911, a suit in equity was commenced in the District Court of the United States for the District of Oregon, in which Hamilton Trust Company was complainant and The Cornucopia Mines Company of Oregon, et al, were respondents, in which the Court had and acquired jurisdiction of the parties and the subject-matter of the suit.

II.

In said suit, and on the 7th day of December, 1911, Hamilton Trust Company filed a motion, based upon the bill of complaint and the affidavit of Emmett Callahan, then attorney for The Cornucopia Mines Company of Oregon, asking for the appointment of a receiver, and based upon such application, the Court made an order appointing Robert M. Betts receiver of The Cornucopia Mines Company of Oregon; and on the 2nd day of January, 1912, the said Robert M. Betts filed his bond and qualified as such receiver and entered upon the discharge of his duties.

III.

It appears from the affidavit of the said Emmett Callahan:

> "That it is necessary that said mines should continue in operation and development; that if said mines were closed down and ceased to be operated and developed, great, irreparable injury and loss would occur by said mines being closed down and not operated; that if said mines are not continued in operation and development, the stamp mill, electric power plant, engines, pumps and other machinery will greatly deteriorate in value and loss; that the tunnels, shafts, winzes, stopes and other underground openings and workings of said Cornucopia Mining Claims and mines would cave in and be greatly damaged, and great loss follow by the action of the elements and the flooding of said openings in said mine and mining claims filling up with water, deteriorating, destroying and damaging said mines and mining claims, its buildings and operating plants in a reasonably

estimated sum of at least from forty to one hundred thousand dollars."

IV.

In the order appointing said Robert M. Betts receiver, the Court authorized and directed him to take immediate possession of all and singular the said real and personal property and to continue the operation of the said mining property and every part and portion thereof as heretofore operated, and to preserve the said property in proper condition and keep the same in repair, and to employ such persons and make such payments and disbursements as may be needful and proper in doing so, and that all persons should turn over and deliver to said receiver any and all of said property into his hands and into his control, and further that out of the moneys "Which come into the hands of said receiver from the operation of the said property or otherwise, he should pay the necessary expenses incident to the operation of the said property and hold the remainder, if any there be, subject to the order of the Court herein, etc."

V.

On the 30th day of April, 1912, a decree of foreclosure was duly entered in the suit, and it was provided in such decree that the proceeds of such sale should be applied as follows:

First.

To the expenses of the sale of said property.

Second.

To the expenses of the receivership herein.

Third.

To the costs of this suit.

Fourth.

Complainant's attorney's fees.

Fifth.

Taxes and other expenses incurred and paid pursuant to the provisions of said mortgage.

Sixth.

The balance to the bond holders.

Seventh.

Any amount remaining, to The Cornucopia Mines Company of Oregon.

And it was therein further provided "At the time of the execution of said deed, said Robert M. Betts, as receiver, shall also make, execute and deliver a good and sufficient deed of conveyance of any and all property of the said company; that upon the execution and delivery of the conveyance as aforesaid, the purchaser shall be let into possession of all of the said property."

VI.

The decree further provides "That any purchaser of the property at such sale shall be entitled to use and apply, in making payment of the purchase price, any of the outstanding bonds secured by said mortgage, as therein provided, but a sufficient portion of

the purchase price should be paid in cash to provide funds for the payment of all costs and expenses incurred, etc."

VII.

On the 29th day of June, 1912, the property was sold under the decree to C. E. S. Wood, as trustee for the bond holders under the trust deed or mortgage, and on the 6th day of August, 1912, the Court made an order confirming the sale. On the 30th day of August, 1912, Robert M. Betts, as receiver, prepared and filed his report as such and asked to be discharged. Such report has never been approved and he has never been discharged as such receiver.

VIII.

On th 29th day of July, 1912, the said John L. Bisher, Jr., while employed on the property, sustained serious personal injuries.

Based upon a good and sufficient showing therefor, the judge before whom the case was tried made an order appointing John L. Bisher guardian ad litem of the said John L. Bisher, Jr., and authorizing the guardian ad litem to commence and prosecute this action.

On the 12th day of October, 1912, John L. Bisher, as guardian ad litem of John L. Bisher, Jr., commenced this action in the United States District Court of Oregon against Robert M. Betts, receiver of The Cornucopia Mines Company of Oregon, et al, to recover for the personal injuries alleged to

have been sustained by the said John L. Bisher, Jr.

The complaint appears in the transcript of the record on pages 1 et sequor.

The answer of Robert M. Betts, receiver, appears on pages 7 et sequor of the transcript.

Plaintiff's reply appears on page 17 et sequor of the transcript.

IX.

The action is founded upon the negligence of the said receiver in the maintenance, construction and operation of an electric power transmission line leading from the power house of The Cornucopia Mines Company of Oregon to the quartz mill of and on the property of The Cornucopia Mines Company of Oregon. It is alleged John L. Bisher, Jr., was in the employ of said receiver and engaged in the construction and repair of such electric power transmission line, and by reason of the faulty construction of the line, and failure to provide a safe place to work, and the neglect to use any device, care or precaution to protect him, and without his fault or neglect, and through the negligence of the receiver, John L. Bisher, Jr., came in contact with electric wires which were charged with a high voltage, and by reason thereof sustained the injuries of which he complains.

All of such matters are denied by the answer of Robert M. Betts, receiver, in which he pleads an affirmative defense, among other things to the effect that, at the time of the accident, John L. Bisher, Jr.,

was not in the employ of the said receiver, but that he was in the employ of the said Robert M. Betts as lessee of the property, and lessee only, and that any injuries which John L. Bisher, Jr., sustained were the result of his own negligence and carelessness, and of risks which he assumed.

A reply was filed denying any and all of the material allegations of the affirmative defense of the answer.

X.

A trial was had before a jury in the said Court on the 11th day of April, 1913, and the jury returned a verdict in favor of the said John L. Bisher, as guardian ad litem, and against the said Robert M. Betts, as receiver, for the sum of Twelve Thousand and Five Hundred Dollars ($12,500), and based upon such verdict a judgment was entered, from which this appeal is prosecuted.

The cause was tried by the plaintiff upon the theory that at the time he sustained his injuries John L. Bisher, Jr., was in the employ of Robert M. Betts as receiver of The Cornucopia Mines Company of Oregon, and that at such time the receiver was in charge, and engaged in the operation of the property under the order of the Court by which he was appointed, and that John L. Bisher, Jr., sustained his injuries as a result of the negligence of the receiver in such operation.

The cause was defended by the receiver upon the theory that John L. Bisher, Jr., was not in the em-

ploy of Robert M. Betts as receiver, and that Robert M. Betts as receiver was not in charge, or engaged in the operation, of the property, and that Robert M. Betts was in charge, and engaged in the operation, of the property as lessee, and that John L. Bisher, Jr., was in the employ of Robert M. Betts as lessee, and not as receiver, and that any injuries which he sustained resulted from his own carelessness and negligence.

CORRECTION OF PLAINTIFF IN ERROR'S STATEMENT OF THE CASE.

The plaintiff in error erroneously assumes that the trial Court did not give his requested instructions numbered 5, 6, 9 and 13, and that his requested instructions numbered 10 and 12 were not included in and made a part of the Court's charge to the jury.

ANSWER TO SPECIFICATION OF ERRORS.

I.

The trial Court did not err in refusing to strike out the testimony of John L. Bisher, Jr., about the climbers, belt and pliers, as specified in the first assignment of error. Such testimony was received without objections, and the exception was on the motion to strike out after the testimony was received and such testimony was competent.

II.

The trial Court did not err in overruling the motion to strike out the testimony of Albert Smith,

specified in assignment of error No. 2. The testimony was received without objection, and the motion to strike was made after all such testimony was received, and the testimony was competent.

III.

The trial Court did not err in permitting the witness, L. W. Sloper, to answer the question specified in the third assignment of error, and any objection to such testimony was thereafter waived and the witness qualified as an expert lineman.

IV.

The trial Court did not err in permitting the witness Smith to answer the question specified in the fourth assignment of error, and the defendant afterwards met that issue and went into that question fully in his cross-examination and in his proof, and is estopped to rely upon that as error.

V.

The trial Court did not err in overruling the defendant's motion for a non-suit. Such motion was based upon the ground of negligence and negligence only, and presented that question of fact, and that question only.

VI.

The trial Court did not err in overruling the objection to the question propounded to Robert M. Betts, specified in assignment of error No. 6. Such question was asked on cross-examination, and was harmless.

VII.

The trial Court did not err in overruling the motion for a directed verdict for the reasons stated in assignment of error No. 7. The Court had jurisdiction; and the second, third, fourth and fifth reasons specified in such motion are based upon questions of fact, and of fact only.

VIII.

The trial Court did not err in overruling defendant's exception to the remarks of plaintiff's counsel, as specified in the eighth assignment of error. Such remarks were in the nature of an argument, and argument only, and were based on inference, and inference only.

IX.

The trial Court did not err in refusing to give defendant's requested instructions No. 1, 2 and 3, because there was sufficient evidence to submit the case to the jury.

X.

The trial Court did not err in refusing to give defendant's requested instruction No. 4, because that was a question of fact, and there was sufficient evidence to submit that fact to the jury.

XI.

The trial Court did not err in refusing to give defendant's requested instruction No. 5, because it gave such instruction.

The trial Court did not err in refusing to give de-

fendant's requested instruction No. 6, because it gave such instruction.

The trial Court did not err in refusing to give defendant's requested instruction No. 8, and gave the substance of such instruction in its charge to the jury.

The Court did not err in refusing to give defendant's requested instruction No. 10, and gave the substance of such instruction in its charge to the jury.

XII.

The trial Court did not err in refusing to give defendant's requested instruction No. 11, because it is not the law.

XIII.

The trial Court did not err in refusing to give defendant's requested instruction No. 12, because that was a question of fact which should have been submitted to the jury.

XIV.

The Court did not err in refusing to give defendant's requested instruction No. 13, because it gave instruction No. 13.

POINTS AND AUTHORITIES.

I.

His Honor, Judge Bean, appointed the defendant as receiver, and he qualified on January 2, 1912, and ever since has been, and is now, the duly appointed,

qualified and acting receiver under such appointment, and the Court had jurisdiction.

Simkin's Federal Equity Suit, 2nd Edition, pages 182 et sequor, and authorities cited.

II.

The order appointing the receiver, and under which he qualified, authorized and directed him "To take immediate possession of all and singular the said real and personal property, and to continue the operation of said mining property and every part and portion thereof as heretofore operated, and to preserve the said property in proper condition and keep the same in repair, and to employ such persons and make such payments and disbursements as may be needful and proper in doing so."

III.

The motion for a non-suit was based upon negligence and negligence only, and it cannot be urged on other or different grounds on this appeal. This is elementary.

Ferguson vs. Ingle, 38 Oregon, page 44.

IV.

It is a question of fact as to whether or not John L. Bisher, Jr. was in the employ of Robert M. Betts as receiver, or Robert M. Betts as lessee, and that fact was submitted to the jury under fair and impartial instructions.

V.

The action is founded upon Oregon's Employers'

Liability Act, and the instructions follow the provisions of that act.

1911 Session Laws of Oregon, page 16;

Lord's Oregon Laws, Volume II, page XXXVI.

VI.

All questions of fact were fairly submitted to the jury, and the findings of the jury are conclusive.

VII.

Having met the issues of fact which may have been made by the introduction of incompetent testimony, plaintiff in error cannot complain at the introduction of any such testimony.

VIII.

The instructions were full and complete, and fairly presented the case to the jury.

IX.

There was ample testimony in the record to sustain the finding that John L. Bisher, Jr. was in the employ of the defendant as receiver.

X.

The plaintiff in error having failed to point out or specify, as a basis for his motion of non-suit, that there was no evidence tending to show that John L. Bisher, Jr. was in the employ of Robert M. Betts as receiver, and thereafter offering evidence to show such fact, waived the right to raise that question.

Ferguson vs. Ingle, Supra.

ARGUMENT.

I.

There is nothing in the question of jurisdiction. Hamilton Trust Company commenced a suit in the U. S. District Court of Oregon against The Cornucopia Mines Company of Oregon, et al, to foreclose a trust deed or mortgage upon certain mining and real property lying and being situate in the County of Baker and State of Oregon, and in that suit, and based upon the affidavit of Emmett Callahan, who was attorney for The Cornucopia Mines Company of Oregon, an application was made to the court for the appointment of a receiver. Pursuant to such application, the court, in that suit, made an order appointing Robert M. Betts as receiver, and at the time of such appointment, the court, in that suit, had jurisdiction of the parties and of the subject-matter, and this case was brought in the identical court in which Betts was appointed as receiver; and under all the authorities based upon the statute then existing, the court would have jurisdiction of this case without regard to the question of citizenship.

The complaint is based upon an act of and a transaction with the receiver, arising from and growing out of his possession and operation of the mine under the order of the court which appointed him. It appears from the record that Robert M. Betts was appointed receiver by the U. S. Court at Portland, Oregon, with authority and direction to take charge of and operate the property of the Cornucopia Mines

Company of Oregon, and that under such order and authority he took possession of the property and was engaged in its operation, as such receiver, at the time of the injury. The court had jurisdiction of the defendant and the subject-matter of the suit, and through its receiver was in the actual possession of the property; and it appears from the record and is found to be a fact by the jury, that, at the time of the accident, John L. Bisher, Jr. was in the employ of Robert M. Betts, as receiver, and this action, by and with the consent and aproval of the court, was brought and tried in the identical court in which the receiver was appointed, and such facts bring it squarely within the law as found in Simkin's A Federal Equity Suit, 2nd. Edition, page 182. None of the authorities cited by counsel are in point in this case. The decisions are either founded upon a different state of facts, or under the old statute.

II.

The order appointing the receiver authorized and directed him to take possession of all the real and personal property and to continue the operation of the whole and every part thereof as it was formerly operated, and to preserve and keep the property in good condition and repair, and to employ such persons as might be necessary for that purpose. Hence, we have a receiver appointed by the court in which the action was brought, with authority and direction to operate the property, and the defendant in this action is the identical person that was appointed

and qualified as such receiver, and was such receiver on the 28th of July, 1912, at the time of the accident, and is now such receiver.

III.

At the close of plaintiff's testimony, defendant moved for a non-suit "Upon the ground that the evidence of the plaintiff and his witnesses does not show any negligence of the defendant whatsoever. It shows that the plaintiff does not know how this injury occurred, and the facts of the injury are left to inference." No other ground was assigned or specified in the motion.

The defendant having pointed out and specified the reasons upon which his motion for non-suit was based, waived any and all other grounds of such motion, and cannot for the first time, and on appeal, assign any other or different grounds for such motion. This is elementary law. In the case of Ferguson vs. Ingle, 38 Oregon, p. 44, and authorities cited, it is held:

> "The rule is well settled that the motion of an adverse party for a nonsuit must specify the grounds therefor, and, unless it does so, an appellate court will not review the action of the trial court in denying the motion." (Citing authorities.) "The reason for this rule is found in the fact that an appellate court will consider only such questions as have been presented to the trial court at the proper time and in an appropriate manner; and when it appears that the question sought to be reviewed was not thus submitted to the Court, the presumption that its decision thereon is correct ought to prevail."

The only question presented by the motion is one of negligence of the receiver, and there is ample testimony sustaining the finding of the jury that the receiver was negligent in the operation of the property.

IV.

It was a question of fact as to whether or not John L. Bisher, Jr. was in the employ of Robert M. Betts as receiver or Robert M. Betts as lessee, and on that fact, after the Court clearly stated and defined the issues, it gave the following charge to the jury:

> "Such being the issues, you will proceed to find, first, whether young Bisher was in the employ of Betts as receiver, or whether he was in the employ of Betts as lessee. This is made a direct issue in the case, and it is for you to determine that issue. It is admitted that Betts was appointed receiver. This is admitted by defendants themselves; and that he continued to be receiver until after this accident transpired, and is now receiver. On the other hand, they say that Betts was the lessee of these mines and was working in that capacity at the time this accident happened. The lease has been offered in evidence, and you have it before you, gentlemen of the jury. It bears date, I think, acknowledged on the the 9th day of November, 1911. It is also shown to you by the record which has been offered in evidence here, that the suit was commenced subsequent to the time this lease was executed and to the time that Betts was constituted lessee of these mines; and also that the receiver was appointed subsequent to that time, and that he took charge as receiver subsequent to that time. Now these

two positions are not inconsistent. Betts could act as the lessee of this mine and also act as the receiver of this mine without one duty being inconsistent with the other. That is to say, if appointed receiver, he would take charge of the mine as receiver, to be operated or to be conducted, or the estate to be closed up subject to the leasehold estate in the premises. Now, it is for you to determine, and I will submit that question to you as a matter of fact, whether or not Betts, at the time this accident occurred, was acting in the capacity of a receiver. If he was, then the negligence, if negligent at all, would be attributed to him. Or whether Betts was acting as lessee. If he was acting as lessee at the time this transaction occurred, or this accident happened, then he would not be responsible. And this fact you must determine from the record which has been offered in evidence here, from what was done in the record, and the returns that have been made, and what Betts reported as having done in the premises, and determine from that record whether or not Betts was acting at the time this accident happened as receiver of these mines, or whether or not he was acting in the operation of the mines as a lessee of the mines."

Under such instruction the jury found that fact in favor of the plaintiff, and there is ample evidence to sustain that finding.

In addition to this, there is ample testimony in the receiver's report, and in particular on the face of the receiver's vouchers, tending to show that in at least some of them the words "Robert M. Betts, Lessee" were placed upon such vouchers with a rubber stamp after the bills had been rendered and after the bills had been paid. The complete record

in the case of Hamilton Trust Company vs. The Cornucopia Mines Company, et al, including the report of the receiver and the vouchers of the receiver, were before the Court in the trial of this case, and portions of them were read in the arguments which were made by respective counsel during the trial of the case; and it appears on page 40 of the "Transcript of Record," as follows:

> "It is agreed between counsel that the record in the suit of Hamilton Trust Company vs. The Cornucopia Mines Company (No. 3869) filed in this Court June 14, 1912, may be considered admitted, and either side may read any portion of it."

Such record is not incorporated in, or made a part of the transcript of the record in this case, and for such reason, the Court below, at our request, has made an order certifying such original record, to be used and inspected by this Court in the trial of this case. And from the testimony which was taken, and from such record, there is ample evidence to sustain the findings of the jury, in legal effect, that John L. Bisher, Jr., was in the employ of Robert M. Betts as receiver at the time of the accident.

Commencing on page 305 of the "Transcript of Record," and while Mr. Betts was on the witness stand in his own behalf, the following proceedings were had:

> "Now on this 21st. day of December, 1911, comes the complainant the Hamilton Trust Company, by Williams, Wood & Linthicum, its solic-

itors, and it appearing that respondent, The Cornucopia Mines Company of Oregon, and respondent Valentine Laubenheimer have been regularly served with the order to show cause herein, and it appearing that the respondent S. W. Holmes, has very little interest herein, and that the application for a receiver herein is not resisted by any of said respondents, and the Court having been fully advised in the premises, it is now hereby ORDERED, ADJUDGED and DECREED that Robert M. Betts be, and he hereby is, appointed receiver of all and singular the real and personal property of the said The Cornucopia Mines Company of Oregon covered by the mortgage sought to be foreclosed herein, and that said receiver be, and he hereby is, authorized and directed to take immediate possession of all and singular the said real personal property wherever situated or found, and to continue the operation of said mining and other property, and every part and portion thereof, as heretofore operated, and to preserve the said property in proper condition and keep the same in repair, and to employ such persons and make such payments and disbursements as may be needful and proper in doing so. It is further ordered that said receiver, within the next ten days, file with the Clerk of this Court, a proper bond, which bond was properly executed and signed. And in connection with that is an affidavit made by Colonel Callahan that it was necessary that the Receiver operate this property,

and the Receiver was operating this property on the 28th day of July, 1912, and has made his reports to this Court. Judge Bean, your Honor, made these orders, and here is the judgment roll."

COURT: This lease was made prior to the time the Receiver was appointed?

MR. SMITH: YES. It was made the 1st day of November, 1911, and executed the 9th.

COURT: When was the receiver appointed?

A. The 21st. of December.

MR. CALLAHAN: The receiver was appointed December 21, 1911.

MR. SMITH: The lease was both executed and recorded long prior to that time, when Mr. Betts was not a party to the proceedings.

(Argument)

COURT: The receiver has reported that he has made certain expenditures, and he has also shown that he has received certain moneys from the mine, so that the expenditure would be set off against what he received. Now, then, were those expenses that he has returned as having expended on account of this mine, were those expenditures incident to keeping up this electric plant and keeping up the expenses touching the running of the plant?

MR. CALLAHAN: Yes.

MR. BETTS. We have to run the plant to run the mine.

COURT: Wouldn't that be part of the business as lessee?

MR. BETTS: Yes.

COURT: They why did you report that as an expense to the receiver, to your operation of the mine as receiver?

MR. CALLAHAN: The lease requires him to account to the Cornucopia Mines Company and pay them a royalty of ninety per cent of the proceeds.

COURT: I will admit this lease and dispose of the other question afterwards. It might be necessary to submit that question to the jury to determine whether they were operating under this lease, or under the receivership.

Page 312.

Q. I direct your attention to a report of the receiver, parts of which have been read, that was filed in this Court August 30, 1912. After that date did you still operate the mine?

A. Yes, sir.

MR. SMITH: Now, this is already in evidence, I believe. (Referring to report).

Page 324. Examination by the Court.

Q. At the time of this accident, was the power plant being operated in connection with the mine?

A. Yes, sir.

Q. Was it used for any other purpose besides the operation of the mine?

A. No, sir.

Q. Entirely for that purpose?

A. Entirely for that purpose, yes sir.

Page 325.

Q. Mr. Betts, you state in this report that you submit this report of the operation of said mines under said lease and receivership to this Court. Section 3, you stated "that during the said receivership of said Cornucopia Mines Company of Oregon, as aforesaid, he held and operated said mines under a written lease with said Cornucopia Mines Company." That he submits this, his final report of the operation of said mines under said lease and receivership to this Court, said account showing that he received $71,681.27 as receipts from ores, bullion and concentrates in the operation of said mines of said respondent." That is true, is it, Mr. Betts?

A. Yes, sir.

Page 326.

Q. "That said account shows his total expenditures in the conduct and operation of said mines, stamp mill, etc., in the sum of $71,681.27, less a deficit of $781.81. That he took proper signed vouchers for each and every item set forth in the account attached hereto and made a part of this final report." Now, Mr. Betts, this says the report of the receiver of the Cornucopia Mines Company of Oregon.

A. Yes, sir.

Q. Is that the report of the receiver of the Cornucopia Mines Company of Oregon?

A. Yes, sir.

Q. It is?

A. Yes, sir.

Page 327.

Q. Why did you make any report to the Court? What did you make this report for?

A. Because I was instructed to by the Court.

Q. You were instructed to operate that plant, too, weren't you?

MR. SMITH: We object to that, if the Court please. That is wholly immaterial.

COURT: This is cross examination. I will permit him to answer.

A. As I understand the order, I was to take possession—

Q. Of the plant?

A. Of the mine and the plant; the mine and the property.

Q. You obeyed the order of the Court, did you?

A. Yes, sir.

Q. You took possession upon the order of the Court, didn't you?

A. Yes.

Q. The Court ordered you to take possession, didn't it?

A. Yes.

Q. And you took possession?

A. I was already in possession.

Q. Well, why did you make any report to the Court then?

A. Because I was instructed to. Is it all right for me to state the way I thought about it?

Q. Yes.

A. I have never been a receiver before, and as I understood it, I was receiver for the company, but my receivership did not abrogate my lease, and the company had a certain royalty, had a certain payment coming. If the mine paid, they were to get a certain percentage, and I made the receiver's report, the report as receiver, and also it showed the money received during the time I was receiver, the money received during that time.

COURT: Received from what?

A. Received from the operation of the mine, from the mining end of it, bullion and concentrates.

COURT: All the bullion mined, or the royalties only?

A. No, the whole thing, showing the total receipts from the mine.

COURT: That included the royalty and the ten per cent additional?

A. Yes, sir.

COURT: So that it included all the product of the mine?

A. It included everything. Yes, sir.

COURT: And you received that as receiver?

A. Yes, sir.

Q. That is, you took account of it as receiver?

A. Yes, sir.

Questions by counsel.

Q. Now, I see in this receipt that you received from bullion and concentrates $11,662.96 in the month of January. That is correct, is it, Mr. Betts?

A. I think it is, yes sir.

Q. $5,962.25 in the month of February, 1912, didn't you?

Page 330.

A. Yes, sir.

Q. And you received in the month of March, 1912, from bullion and concentrates—just bullion and concentrates?

A. Yes, sir.

Q. $13,421.47, didn't you, Mr. Betts?

A. Yes, sir.

Q. Now, you received in April, 1912, from bullion, concentrates and Trading Company, and Standard Oil Company the amount of $5,478.05, didn't you?

A. Yes, sir.

Q. You received in May, 1912, from bullion and concentrates and S. & F.—what is that?

A. S. & F. Fordwarding Company, it says, forwarding account with the Railroad Company.

Q. Coffinberry and Witten—you received that month $8,709.32, didn't you, Mr. Betts?

A. Yes, sir.

Q. In the month of June, Mr. Betts,, you received from bullion and concentrates and the store $11,386.65, didn't you?

A. Yes, sir.

Q. Now, in the month of July, 1912, the month in which the boy was injured, you received from Ross, concentrates, and yourself $2100—what was that $2,100? Did you advance that $2,100? What was that for, Mr. Betts?

A. Why, I was receiving no compensation as receiver, and as lessee I would credit my—

Q. Receiver account?

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A. No, I would take money out of the—

Q. Receiver's fund?

A. No.

Q. Whom did you take money from?

A. I say, as lessee—I will get this straight.

MR. SMITH: I think the witness has a right to answer the question. If he doesn't answer it counsel's way, if it is the truth, it is just the same.

COURT: Yes.

A. As lessee, I would take money as I needed it for my personal expenses, and the bookkeeper didn't understand—made a mistake—and I kept

two sets of books, you understand, one as receiver and one as lessee, and he took money out of the receiver—well, let me see. I don't know how to make that plain.

Q. This is copied from your receiver accounts, isn't it? This is the receivership books, isn't it?

A. Yes, sir.

Q. This is copied from the receivership books?

A. Yes. And this amount was wrongly charged. It should have gone onto the lessee books, so when it was discovered, we credited the receiver account with that much money which had been drawn out.

Q. Well now, Mr. Betts, there is several thousand dollars—one hundred dollars, and $3500, and and $455, and $1,000 and $3,078. in concentrates. Where did you get those concentrates?

A. Mining.

Q. You got them from operating the mine?

A. Yes, sir.

It appears from his report that, during his administration as receiver, and prior to the time of filing his final report, he received $71,681.27 and paid out $781.81 more than he received. It also appears from his vouchers that, during his receivership and prior to such report, he purchased and acquired betterments and materials from the following named persons, for the following named purposes and for the following named amounts:

Voucher No. 581—H. B. Thomas:
For transformers ..... $ 119.70

Voucher No. 575—McKim & Co.:
1 hoist 225.00

Voucher No. 571—Hawkins & Smith:
For sawing timber 1575.00

Voucher No. 569—General Electric Co.:
For electric supplies 97.38

Voucher No. 568—General Electric Co.:
Fuses and wire 100.16

Voucher No. 561—Carlson-Lusk Hardware Co.:
Rails, plates and bolts 488.37

Voucher No. 559—N. B. Booley:
Hauling lumber 250.00

Voucher No. 554—Basche-Sage Hardware Co.:
150 barrels cement 472.50

Voucher No. 617—Union Iron Works:
Plates, brushes, etc 73.55

Voucher No. 613—S. & F. Forwarding Co.:
Cyanide plant and machine supplies 416.98

Voucher No. 609—Walter L. Reed:
Cyanide plant and other expenses... 140.00

Voucher No. 605—Alexander McDonald:
Purchase five acres for power site 250.00

Voucher No. 598—Galigher Machine Co.:
Machine parts 77.43

Voucher No. 584—Basche-Sage Hard. ware Co.:
150 barrels cement, steel plates 246.50

Voucher No. 640—S. & F. Forwarding Co.:
Betterments of machinery, cyanide plant, power repairs, etc 1332.68

Voucher No. 631—General Electric Co.:
For machinery, etc 319.48

Voucher No. 622—Blue Mountain Iron Works:	
Dies and bucket	155.68
Voucher No. 650—Basche-Sage Hardware Co.	
Cyanide plant	62.70
Voucher No. 658—Denver Rock Drill & Machine Co.	
Mine repairs	139.50
Voucher No. 659—Galigher Machinery Co.:	
Mining supplies	215.66
Voucher No. 672—Triffilli Bros:	
Pig iron, coke, carload of coal	616.11
Voucher No. 687—General Electric Co.:	
Brushes and fuse	74.63
Voucher No. 691—E. P. Jamieson & Co.	
Drills, etc.	246.00
Voucher No. 692—Luce & Rosborough.:	
Betterments to machinery and cyanide plant	1523.27
Voucher No. 694—McKim & Co.:	
Ore bucket and cars	115.00
Voucher No. 695—Mine & Smelter Supply Co.:	
Six car trucks	177.00
Voucher No. 709—American State Bank:	
Timber	95.00
Voucher No. 713—Basche-Sage Hardware Co.:	
Powder	684.60
Voucher No. 720—Hawkins & Smith:	
Lumber	250.00
Voucher No. 740—Pay Roll:	
Cyanide plant	750.00
Repairs	407.80
Power labor	305.75
New power plant	82.50
Voucher No. 756—General Electric Co.:	
Tubes, sockets and lamps	138.03

Voucher No. 758—Galigher Machinery Co.:
Screen rods, dies, etc..... 83.35
Voucher No. 763—Hughes & Co.:
Boiler and stand..... 11.61
Voucher No. 765—International High Speed Steel Co.:
Betterments 95.34
Voucher No. 767—Alexander McDonald:
5 acres of ground and right-of-way 300.00

Making a total amount paid out for betterments and improvements of $12,714.26.

In addition to such items it appears from the vouchers that the said Robert M. Betts paid himself a salary as receiver of $350.00 per month, as follows:

Voucher No. 557—Robert M. Betts:
Salary for January, 1912.....$350.00
Voucher No. 558—Robert M. Betts:
Salary for February, 1912..... 350.00
Voucher No. 626—Robert M. Betts:
Salary for March, 1912..... 350.00
Voucher No. 653—Robert M. Betts:
Salary for April, 1912..... 350.00
Voucher No. 676—Robert M. Betts:
Salary and other expenses..... 381.75
Voucher No. 711—Robert M. Betts:
Salary and traveling expenses..... 455.00
Voucher No. 745—Robert M. Betts:
Salary and legal expenses..... 384.00

Making a total salary paid to him as receiver, from January 1 to August 1, 1912, of $2,620.75.

As evidenced by the receiver's vouchers there was paid to Emmett Callahan, as attorney for the receiver, the following amounts:

Voucher No. 538—Emmett Callahan:
Legal services for December, 1911.....$100.00
Voucher No. 562—Emmett Callahan:
Legal expenses for January, 1912..... 100.00
Voucher No. 592—Emmett Callahan:
Legal services for February, 1912..... 100.00
Voucher No. 628—Emmett Callahan:
Legal expenses for March, 1912..... 100.00
Voucher No. 654—Emmett Callahan:
Legal services for April, 1912..... 100.00
Voucher No. 678—Emmett Callahan:
Legal services for May, 1912..... 100.00
Voucher No. 715—Emmett Callahan:
Legal expenses 100.00
Voucher No. 748—Emmett Callahan:
Legal expenses 100.00

It thus appears that the receiver employed and paid an attorney from the date of his appointment to the 1st. day of August, 1912, at the rate of $100.00 per month. There are many other and different facts which would show, or tend to show, that Robert M. Betts was engaged in the actual operation of this property as receiver under the order of the Court. While a large amount of money was received by the receiver in the operation of the plant, it appears that the property was operated at a small loss. Under the terms and conditions of the lease, The Cornucopia Mines Company of Oregon was to have and receive a royalty of 90 per cent on the net proceeds from the operation of the property. There were no net proceeds, and yet it appears from the receiver's own report and vouchers that, during all of that period when he claims to have been in possession of the property, and operating under the

terms and conditions of the lease, he was charging and receiving $350.00 a month for his services as receiver, and that he employed and paid an attorney $100.00 per month for advice and legal services to him as receiver. It also appears from such reports that, during that period, he actually purchased and paid for improvements which were placed upon the property to the amount of $12,164.26, and that he purchased and acquired real property and rights of way for which he paid the sum of $550.00

The lease does not anywhere mention or provide that he shall have and receive any salary from the company during the period of the lease. It nowhere authorizes him to employ an attorney for $100.00 per month, or any other sum, at the expense of the company. It nowhere provides or contemplates that the lessee shall expend the sum of $12,714.26 for betterments and improvements on the property.

It is true that the lease was executed prior to his appointment as receiver. It is also true that the order of the Court by which he was appointed authorized and directed him to take possession of and operate the property, and that the receiver as a witness on his own behalf testified that he did take possession of the property under the order of the Court. It is indeed strange that, if he was in possession of and operating the property under the lease, he would be charging the company and paying himself as receiver the sum of $350.00 per month for his services as receiver, and that as such receiver he would employ an attorney and pay him $100.00 a month

for legal advice and services to him as receiver, and that during that period he would make betterments and improvements on the property to the amount of $12,164.26 and would purchase real property and rights of way to the amount of $550.00, neither of which were ever contemplated, mentioned or provided for in the lease under which he claims to have operated.

The defendant testified that he was in possession of and operating this property as lessee. The order of the Court appointing him receiver, ordered and directed that he should take possession of the property and operate it as receiver. He accepted and qualified as receiver under that order, and there is nothing in the record appointing him that shows, or tends to show, that he was in possession of the property under a lease, or that any lease existed; and there is nothing in such record that shows, or tends to show, that the Court had any knowledge of the existence of such lease.

While it is true that Robert M. Betts as lessee was not made a party defendant in the foreclosure suit, it is a fact that he was appointed receiver in a suit to foreclose a trust deed or mortgage which was executed a long time prior to the execution of his lease, and it is a fact that any lease which Robert M. Betts had from The Cornucopia Mines Company of Oregon would be subject and inferior to the terms and conditions of the mortgage which was foreclosed in that suit.

The Court having made an order in the suit of

Hamilton Trust Company to take possession of and operate the property, and having appointed Robert M. Betts receiver, and he having qualified as such receiver under the terms and conditions of that order, and having taken possession under that order, he is estopped to claim or assert that he was in possession of or operating the property as lessee; and exclusive of the fact that he was appointed as receiver under that order of the Court and qualified as such and took possession of the property, there is ample and abundant testimony in the record to show that he was operating the property as receiver.

The words "Robert M. Betts, Lessee" were placed upon the vouchers with a rubber stamp, and while it is true that he testified such words were placed upon such vouchers at and before their payment, he is the only witness that testified to that fact, and it is very apparent that the jury did not believe what he said. It would have been an easy matter for such words to have been placed upon the vouchers with a rubber stamp after Bisher's injury, and in truth and in fact it appears from some of the vouchers, at least, that such words were placed thereon after they were marked paid, and, in any event, that would be a question of fact, and there is ample testimony to support the verdict on that point.

Again the report of the receiver itself is evidence of the fact that he was operating the property as receiver. He testifies on page 328 of the transcript:

Q. You took possession upon the order of the Court, didn't you?

A. Yes.

COURT: Received from what?

A. Received from the operation of the mine, from the mining end of it, bullion and concentrates.

COURT: So that it included all the product of the mine?

A. It included everything, yes sir.

COURT: And you received that as receiver?

A. Yes, sir.

Again on page 331:

COURT: Yes.

A. As lessee, I would take money as I needed it for my personal expenses, and the bookkeeper didn't understand—made a mistake—and I kept two sets of books, you understand, one as receiver and one as lessee, and he took money out of the receiver—well, let me see. I don't know how to make that plain.

Under the lease, the Cornucopia Mines Company was to have 90 per cent of the net proceeds from the operation of the property, and the property was operated at a loss and there were no net proceeds. Under that state of facts, how could the plaintiff in error take "Money out of the receiver?" And the jury could well have found, from his attempt to explain, that he was operating the property as receiver and was not operating the property as lessee.

If the plaintiff in error had been operating the property as lessee under the terms of that lease, no money would ever come into his possession as re-

ceiver. He never would have had any funds with which to pay himself $350.00 per month as receiver. He never would have had any funds with which to pay his counsel $100.00 per month for advice and legal services to him as receiver. He never would have had any funds with which to purchase and place $12,164.26 in betterments and improvements on the property. He never would have had any funds with which to purchase and pay for real property to the value of $550.00; and if he had been in possession of the property as lessee he never would have expended any amount in betterments and improvements on the property.

If he had been in possession of the property as lessee, he never would have installed a cyanide plant costing over $3,000; he never would have purchased any of the items mentioned in the vouchers constituting the amount of $12,714.26.

How, and upon what theory, can the plaintiff in error justify himself that he was in possession of and operating this property as lessee when he makes expenditures for betterments and improvements to the amount of $12,714.26, and pays himself salary as receiver to the amount of $2,620.75, and pays his attorney, for legal services to him as receiver, the sum of $800.00, when he was not required to make any or either one of such payments under the terms and conditions of the lease. It is fair to assume that no rational, reasonable man, operating under the terms and provisions of a lease, would ever incur unnecessary expense for the sole use and benefit of,

the property to the amount of $16,135.01, which he was not required to do under the terms and conditions of his lease. From such facts alone the jury would be amply justified in finding that he was not operating the property as lessee.

V.

This action is founded upon Oregon's Employers' Liability Act, Session Laws of Oregon 1911, page 16; Lord's Oregon Laws, Volume 2, page XXXVI, and the instructions follow the provisions of that act, which, with the title, and insofar as it pertains to this case, are as follows:

> "AN ACT. Providing for the protection and safety of persons engaged in the construction, repairing, alteration, or other work, upon buildings, bridges, viaducts, tanks, stacks and other structures, or engaged in any work upon or about electrical wires or conductors or poles, or supports, or other electrical appliances or contrivances carrying a dangerous current of electricity; or about any machinery or in any dangerous occupation, and extending and defining the liability of employers in any or all acts of negligence, or for injury or death of their employees, and defining who are the agents of the employer, and declaring what shall not be a defense in actions by employees against employers, and prescribing a penalty for a violation of the law."
>
> Section 1. "All owners, contractors, sub-contractors, corporations or persons whatsoever engaged in the manufacture, transmission and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that all metal, wood, rope, glass, rubber, gutta percha or other material whatever, shall be

carefully selected and inspected and tested, so as to detect any defects, etc. And in the transmission and use of electricity of a dangerous voltage, full and complete insulation shall be provided at all points where the public or the employees of the owner, contractor or sub-contractor transmitting or using said electricity are liable to come in contact with the wire; and dead wires shall not be mingled with live wires, nor strung upon the same support, and the arms or supports bearing live wires shall be especially designated by a color or other designation which is instantly apparent; and live electrical wires carrying a dangerous voltage shall be strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock; and generally all owners, contractors or sub-contractors and other persons having charge of or responsible for any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity of preserving the efficiency of the structure, machine or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices."

Section 2. "The manager, superintendent, foreman or other person in charge or control of the construction of works or operation, or any part thereof, shall be held to be the agent of the employer in all suits for damages for death or injury suffered by an employee."

Section 5. "In all actions brought to recover from an employer for injuries suffered by an employee the negligence of a fellow servant shall not be a defense where the injury was caused or contributed to by any of the following causes, namely: Any defect in the structure, materials, works, plant or machinery of which

the employer or his agent could have had knowledge by the exercise of ordinary care; the neglect of any person engaged as superintendent, manager, foreman, or other person in charge or control of the works, plant, machinery or appliances; the incompetence or negligence of any person in charge of or directing the particular work in which the employee was engaged at the time of the injury or death; the incompetence or negligence of any person to whose orders the employee was bound to conform and did conform and by reason of his having conformed thereto the injury or death resulted; the act of any fellow servant done in obedience to the rules, instructions or orders given by the employer or any other person who has authority to direct the doing of said act."

Section 6. "The contributory negligence of the person injured shall not be a defense, but may be taken into account by the jury in fixing the amount of the damage."

Section 7. "All acts or parts of acts inconsistent herewith are hereby repealed."

Based upon that statute, the Court gave the following instructions:

"Now, I will call your attention to the statute in this case, and make such remarks with reference to it as I deem pertinent. The statute requires that all persons engaged in the erection or operation of any machinery, or in the 'manufacture, transmission, and use of electricity, or in the manufacture or use of any dangerous appliance or substance, shall see that all metal, wood, rope, glass, rubber, gutta percha, or other material whatever, shall be carefully selected and inspected and tested, so as to detect any defects * * * and in the transmission and use of electricity of a dangerous voltage full and complete insulation shall be provided at all points where the public or the employees

of the owner, contractor, or subcontractor transmitting or using said electricity are liable to come in contact with the wire, and dead wires shall not be mingled with live wires, nor strung upon the same support, and the arms or supports bearing live wires shall be especially designated by a color or other designation which is instantly apparent, and live electrical wires carrying a dangerous voltage shall be strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock; and, generally, all owners, contractors or subcontractors, and other persons having charge of, or responsible for, any work involving a risk or danger to the employees or the public, shall use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine, or other apparatus or device, and without regard to the additional cost of suitable material or safety appliance and devices.'

"This statute is intended to be an operative statute, and was intended also to permit persons to operate in certain occupations, or in the occupation, we might say, by specifying the transmission of electric energy. It was not designed by the statute to compel persons to go out of the business, but it was designed to protect persons or employees where the occupation is being carried on. And hence we might say in this case that the requirements of the statute were not designed to kill the business of the persons engaged in the transmission of electric energy, and you must give the statute, or the Court must, such reasonable construction as will permit people to go on with the work. And if it appears that the requirement of the statute will absolutely prevent people from operating any electric energy, why then we must give the

statute such reasonable construction as will permit persons to go on with the work. And in this connection I will give you an instruction which is asked by one of the parties:

"'If you believe from the evidence that it was not practicable for the employer to insulate the wires at the place of the happening of the injury, and if you further believe that the weather insulation spoken of was not practicable to use at that place, then I instruct you that the law does not require a vain or useless thing to be done. All statutes must be read and construed and applied to human affairs by the rule of reason, and the duties which are imposed upon masters by what is known as the Employers' Liability Law of Oregon are such duties and obligations as can be performed reasonably and efficiently, and no obligation is laid upon the master to place upon his business an expense in furnishing appliances, which are prohibitory either by the extreme cost or frequent renewals, which by the frequency of the renewal of such appliances would compel the employer to close his enterprise. If you, therefore, believe that it was not practicable for the employer to insulate the wires and keep them insulated as against shock at the place of the injury, then I instruct you, as a matter of law, that it was not the duty of the employer to attempt to insulate the wires with weather insulation and you cannot consider this failure to so insulate the wires and keep them insulated as negligence.

"You must take into consideration in this connection, gentlemen of the jury, whether or not the defendant could have insulated these wires as required by the statute and still continued his business. If it was too expensive to do that—if the expense laid upon the business by the insulation was such that the party must go out of business, or that it would render his

occupation unprofitable so that he could not operate, then you must determine from all the facts in the case whether or not he used due care and precaution—the utmost care and precaution, you might say in this case—in doing what he did do in the premises in the placing of these wires and leaving them uninsulated.

"You will determine further than this whether or not the defendant here used due care and precaution, such as I have defined to you that defendant must use in this case, in placing the wires upon the supports, the kind of support that was provided, and the distance the wires were placed from the supports, and the distance the wires were placed apart one from the other, and determine whether or not the defendant has used ordinary and due care, such care as is required when engaging in the transmission of this dangerous agency by a person who would exercise such care for the protection of his workmen.

"It is furthermore insisted that the defendant did not furnish the appliances that he should have provided in the present case. I refer to the furnishing of rubber gloves and pliers, and the body protectors that have been referred to in the testimony. It is the duty of the employer, as I have indicated before, to furnish proper appliances for use by the employees looking to their protection, and in this case there has been a good deal said about the rubber gloves, and about the defendant not having furnished rubber gloves when he ought to have furnished them. I will give you an instruction as follows:

" 'As to rubber gloves, I instruct you that if you believe from the evidence that the nature or character of the work in question was such that rubber gloves were not an essential requisite, then failure to furnish them would not be negligence.'

I think I should instruct you a little further as to the statute in this case, so that you may understand fully the relations existing here. The statute provides furthermore, that in all actions brought to recover from an employer for injuries suffered by the employee, the employer is made responsible for 'any defect in the structure, materials, works, plant, or machinery of which the employer or his agent could have had knowledge by the exercise of ordinary care; the neglect of any person engaged as superintendent, manager, foreman, or other person in charge or control of the works, plant, machinery, or appliances; the incompetence or negligence of any person in charge of or directing the particular work in which the employee was engaged at the time of the injury or death; the incompetence or negligence of any person to whose orders the employee was bound to conform and did conform and by reason of his having conformed thereto the injury or death resulted; the act of any fellow-servant done in obedience to the rules and instructions or orders given by the employer or any other person who has authority to direct the doing of said act.' This you will consider in connection with the question whether or not Harbert was a person authorized by the defendant to direct what Bisher should do, and whether or not he did direct him to assist in regulating these wires."

Such instructions are clearly within the provisions of the statute and follow the law, and under the statute are the law, and counsel for plaintiff in error do not question the validity of the law, and do not have any legal right to complain of such instructions.

VI.

Under the instructions, all questions of fact were

fairly submitted to the jury and the jury found for the plaintiff; and under the record the verdict is conclusive.

In numerous cases the Supreme Court of the United States has decided:

> "Where there is some evidence on the question of fact, it is error for the court to take the question from the jury."
>
> "Where there is evidence for the plaintiff sufficient to go to the jury, it is error to direct a verdict for the defendant."
>
> "Where the testimony presents matters of fact vital to the controversy, upon which the plaintiff has the right to the opinion of the jury, it is error of the court to withdraw the the case from the jury and direct a verdict for the defendant."
>
> "It is not proper for the court to instruct the jury 'That upon the whole evidence the plaintiff ought not to recover,' if any posible construction of the testimony would support the action."
>
> "Where the evidence adduced by the plaintiff, if uncontradicted, warranted the jury in finding a verdict in his favor, and defendant's evidence did not make out an indisputable case, a refusal to direct a verdict for defendant is not erroneous."
>
> "If, upon any construction which the jury is authorized to put upon the evidence, or by any inference they are authorized to draw from it, the conclusion of contributory negligence can be justified, the defendant is not entitled to an order directing a verdict in his favor."
>
> "If there is any evidence reasonably tending to support the material allegations of the complaint, the case should be submitted to the jury."
>
> "Where two inferences may be legitimately

drawn from the evidence, one favorable and the other unfavorable to the defendant, a question for the jury is presented."

"A motion for a nonsuit admits the truth of plaintiff's testimony, and every legitimate inference of fact which may be reasonably deducible therefrom."

It is fundamental that a verdict should be sustained where there is any testimony to sustain it, or where it can be justified from any probable or reasonable inference from any proven fact or facts. Many things happen in the court room which have an important bearing on the result of a jury trial. This is especially true from the action, appearance and conduct of the witnesses. In this case, the plaintiff in error filed a motion for non-suit and filed a motion for a directed verdict, each of which, as appears from the record, was promptly overruled by the Court without even an argument. His Honor, Judge Wolverton, presided during the trial of that case, heard the testimony of all the witnesses, and saw them while testifying, and it is very apparent that he thought there was no merit in such motions, and, while his legal opinion is not binding upon this Court, yet, owing to the fact that he presided at that trial, it is entitled to worthy consideration.

There are no valid, legal objections to any instructions which were given by the Court to the jury, and the jury heard the testimony of all the witnesses and saw them while they were testifying, and returned that verdict; and in overruling the motion, that verdict was sustained by the lower Court, and it

should not be set aside if there is any evidence or inference of fact to sustain it.

VII.

Plaintiff in error complains at the introduction of some incompetent testimony, in particular as to climbers, belt and pliers.

The Court will note that all of such testimony went in without objection, and after it was in the record without objection, counsel then moved to strike it out "for the reason that there is no risk alleged to have been occasioned by them at all. It simply encumbers the record."

Under that state of facts, if it was error at all, it would not have been prejudicial error. If counsel desired to object to such testimony, it was their duty to object at the proper time and in the proper way, and they cannot wait until such testimony is in the record without objection, and then move to strike it out for the reason stated, and asign the overruling of such motion as error.

This same rule of law applies to the assignment of error No. 2.

Again, the Court will note, it appears from the record, that all of the issues which were made and presented in the trial of the case by the defendant in error, were met and presented in the testimony on behalf of the plaintiff in error. Plaintiff in error has no legal right to complain at the trial of the case on immaterial issues, when he met those issues by counter testimony on such issues. And, in any

event, such testimony could not be, and was not, prejudicial.

VIII.

The Court charged the jury fully and fairly on all of the issues made by the pleadings, and anyone reading such charge must admit and concede that it was fair and impartial, and presented all of the issues to the jury in an intelligent, clean-cut manner—in plain, concise language—and that there are no instructions of which the plaintiff in error has a legal right to complain.

Since preparing our points and authorities we have been served with a copy of the brief of plaintiff in error, and there is no occasion to discuss the remaining points designated in our brief.

REPLY ARGUMENT TO BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

We have carefully read the brief of the plaintiff in error, and, legally speaking, but two questions are presented in the brief. First: That the Court had no jurisdiction, and, Second: That there is no testimony to support the verdict.

There is no question as to jurisdiction. As stated, all of the authorities cited by plaintiff in error are old decisions, founded upon the old statutes; and the accident to Bisher grows out of an **act** or **transaction** of the **receiver** in carrying on the business and the operation of the property under the order of the

Court, and under the **facts in this case,** counsel have not cited, and will never be able to find an authority, sustaining their position.

Counsel for plaintiff in error requested a number of instructions. Their instructions numbered one, two, three and four are, in legal effect, to return a verdict for the defendant.

Their instructions numbered five, six and seven were given as requested.

Their instructions number eight would invade the province of the jury, and is not the law and should not have been given.

All that portion of instruction number nine, commencing with the words "As to rubber gloves," and ending with the words "Would not be negligence," was given as requested. The remaining portion of instruction number nine is not the law and should not have been given.

Under the facts in this case, it would have been error to give instruction number ten, and the substance of it was fully covered by the general charge. Johnnie Bisher was a boy 18 years of age, and is not shown to have had any knowledge or skill in or for the work in which he was employed, and it clearly appears from the testimony that he was following the instructions of his superior, and nothing was ever said to him by anyone about rubber gloves.

Instruction number eleven is not the law and should not have been given.

Instruction number twelve is not the law. It would invade the province of the jury on a material

fact, and, insofar as it is the law, is fully covered by the general charge.

Instruction number thirteen was given by the Court in the identical language in which it was requested.

It clearly appears that the Court gave to the jury all of the instructions which were requested by plaintiff in error that it should have given under the law, and that, as a matter of fact, the Court did give plaintiff in error's requested instructions numbers five, six, seven, nine and thirteen, and that the remaining instructions which were requested and not given were not the law and would invade the province of the jury. We are at a loss to know why counsel for plaintiff in error, in the "Transcript of Record," or in their brief, would try to create the impression that the Court did not give their requested instructions numbered five, six, nine and thirteen and only gave their instruction number seven.

The brief of plaintiff in error contains numerous excerpts form the testimony of different witnesses on different features of the case, and based upon such excerpts only, counsel endeavor to show there is not sufficient testimony to sustain the verdict. From an examination of the transcript of the entire testimony, it will appear that there is other and competent testimony which flatly contradicts such portions set out in the brief. They seem to assume, because there was **some** testimony on behalf of the plaintiff in error to sustain the issues which were

made by the pleadings, that it is the duty of the Court to set aside the verdict and to grant a new trial, without regard to any of the testimony in the record which sustains the issues made by the pleadings in behalf of the defendant in error; and they assume that, because the plaintiff in error claimed that he was operating the mine as the lessee, that fact should be taken as true, and that the defendant in error was not entitled to recover. They overlook the fact that that question was fairly submitted to the jury under the instructions of the Court, and found in favor of the defendant in error.

They also overlook the fact that the decree in the suit of Hamilton Trust Company vs. The Cornucopia Mines Company, et al, expressly provides that the receiver shall execute a deed to the property mentioned and described in the trust deed or mortgage, and that at the time such deed is executed, the purchaser shall be let into possession of the property, and that such deed was not executed by the receiver until the 20th day of November, 1912—four months after Bisher sustained his injury. We concede that, under the laws of Oregon, from the date of the sale, the purchaser is entitled to the possession, but there is nowhere in the record any evidence which shows, or tends to show, that the purchaser at such sale ever did take possession of the property, or that he ever claimed that he took possession of such property.

The law says that the purchaser "Shall be entitled to the possession of the property purchased,"

and it is necessary for him to take possession before he can be in possession. Counsel say "The purchaser immediately on the day of sale, took possession of said property under the foregoing statute." There is nothing in the record upon which to base that statement.

During all of this time this property was under the jurisdiction of the Court and in its control and possession by and through its receiver, and the purchaser would not be entitled to the possession of the property except by or through an order of the Court.

Commencing on page 49 of the brief of plaintiff in error under "STATEMENT OF FACTS," counsel give certain excerpts from the testimony, and based upon such excerpts, claim that their motions for non-suit and for a directed verdict should have been sustained, and they cite some authorities, none of which are decided under the Employers' Liability Act of Oregon, which makes a radical change in the relations between Master and Servant in the operation and construction of high tension wires. And on page 62 of their brief, under the head "INSUFFICIENCY OF EVIDENCE," they assume that Bisher was a volunteer, and based upon that **assumption,** claim that the verdict cannot be sustained.

The question as to whether or not Bisher was a volunteer was fairly and squarely sumbitted to the jury under the instructions of the Court in plaintiff in error's requested instruction number five, which was given by the Court.

And again, counsel assume that, because there was some evidence on behalf of the defendant in the action tending to show that Bisher was a volunteer, such testimony must be taken and accepted as true, without regard to the testimony on behalf of the plaintiff in the action to the effect that he was **not** a volunteer, and that he was following the instructions and doing what he was told to do by his superior. This clearly appears from Bisher's testimony:

Page 46 of the Transcript of Record:

Q. What did Mr. Buxton tell you to help Harry Harbert to do?

A. He didn't say just what to do. He just said, help Harry. He said Harry would tell me what to do.

Q. Well, what did Harry tell you to do?

A. Well, Harry climbed the pole, and I just carried some of the tools along first, and he went up the pole and fixed three or four himself. Then he told me, he says, "Well, it is pretty hard standing up there so long." He said, "We will take turns about." He said "You come up and fix one, and I will fix the next one." I said, "All right," because Buxton told me to do what he would tell me; that he would tell me what to do. He went up there, and told me to fix one and he would fix the other one. He said it would be easier on both of us. We did that for a few times. He worked a day or two that way, and then he saw that was pretty hard standing up there so long for one man, and he said, "We will

both come up at the same time." He says, "One can wrap one end of the tie wire while the other wraps the other." He said, "We can do it quicker," and he says "We can watch each other at the same time," and he said, "Maybe we won't get no shock if we watch each other. Maybe it will make it safer," And that is the way we were doing when I was injured.

Page 48:

A. About the same distance.

Q. What did Harry tell you to do?

A. Well, he just said to fix—he didn't say just what to do then, because he told me what to do before.

Q. What did he tell you to do before?

A. He told me to wrap one end while he wrapped the other. He says, "We can do it quicker."

Q. What did you do when you got up on top of the pole?

A. Well, he had already had one end of the middle wire, tie wire, unwrapped, and I unwrapped my end, and took the middle wire in my right hand and started to lift it over the pole, as we had been doing before.

Q. Why did you lift the wire over the pole, or did anyone tell you to do that, Johnnie?

A. Harry told me to do that.

Q. What did he tell you to do that for?

A. Well, to keep it farther away, so it wouldn't be apt to touch the other wire.

Q. Now, what happened when you were lifting this wire?

A. I just started to lift the wire up with my right hand. I was standing just—the wire came nearly to my shoulders—just about that high. I had to get up high enough, because they were pretty heavy. I just started to lift up the middle wire, and that is the last I remember.

Q. Johnnie, what tools or appliances did Mr. Betts furnish you with at the time that you were set to work upon that line, if any?

A. I never worked on the line before excepting just this time.

Q. A little louder Johnnie.

A. I never worked on a line before until this time.

Q. Did they furnish you with any tools?

A. Well Mr. Harbert, Harry Harbert, gave me a pair of climbers and a belt, and a pair of pliers.

Page 52:

Q. Did Mr. Buxton, the foreman at the power house, give you any orders, Johnnie?

A. He just told me to help Harry; that he would tell me what to do.

Q. That Harry Harbert would tell you what to do?

A. Yes, sir.

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A. You mean, what did Harry tell me to do?

Q. Yes.

A. When I first started to work with him, I just carried insulators and wires and he went up the pole himself. Then after working about three or four days, or not quite that long, I guess,—

Q. A little louder.

A. After we had worked about two days, then it was pretty hard work for one man, he said, and he said it got tiresome up there, he said we would take turns about. He said I could climb one and fix it, and he would climb the next one. So we did that for a time. And then one man standing up there so long would get tired, and he said, "We will both go up at the same time." He said one could wrap one end of the tie wire, while the other wrapped the other end; we would do it quicker; and he said we could watch each other at the same time, and wouldn't be so apt to get a shock. So that is what we were doing when I was injured. We were both up the pole.

Page 56:

Q. Why were you lifting this middle wire over here, Johnnie?

A. Well, Harry told me we would lift it over, and that would make it further away from this one, so we could fix this one without getting a shock.

Q. When you were lifting this middle wire, did you use one or both hands?

A. I just started to lift that one with my right hand, one hand.

Q. And then you were between these two wires?

A. My head was between these two wires.

Q. Who told you to do it that way?

A. Harry Harbert.

Q. Where is Harry Harbert?

A. Standing there (pointing to Harbert).

Page 71:

Q. Did he ever tell you that it might become necesary for you to climb the pole?

A. He told me just to help Harbert.

Page 73:

A. I don't know what they wanted me for there. He just told me to go down there. He told me to help Harbert.

Because there is **some** testimony tending to contradict this testimony of Bisher, the plaintiff in error asks the Court to set aside the verdict. All the witnesses were present and testified in open court, and the jury found that young Bisher told the truth, and it is very apparent from the character of his testimony, and the manner in which he testified, why the jury would make such a finding. And yet, in the face of such testimony, and the requested instruction number five of plaintiff in error, which was given by the Court, and the findings of the jury, and the overruling of the motions for non-suit and for a directed verdict, counsel wants the Appellate Court to find as a fact that young Bisher was a volunteer, and for that reason ought not to recover.

On page 79 of the Brief of plaintiff in error it is said: "We desire the Court to bear in mind that the complaint does not state facts sufficient to con-

stitute a cause of action in this; it fails to allege when Bisher received the double contact, or what caused him to receive it."

"The evidence does not disclose how, or why, or when, or in what manner, or in the discharge of what duty he became entangled in the wires. Therefore, the complaint is clearly insufficient."

This statement is not worthy of consideration. Any and all of the facts and conditions and surrounding circumstances at the time of the accident were detailed to the jury; and it was caused by neglect to comply with the terms and provisions of the Employers' Liability Act of the State of Oregon, and through the failure to insulate the wires, and the stringing of said wires at an insufficient distance from the poles or supports to permit repairmen to freely engage in the work.

On page 82 of the Brief it is said "THIRTY INCHES IS THE REGULAR SPACE TO WORK BETWEEN." The statute does not contain any such provision. It provides: "Live electrical wires carrying a dangerous voltage shall be strung at such distance from the poles or supports as to permit repairmen to freely engage in their work without danger of shock." Generally, parties in interest shall "use every device, care and precaution which it is practicable to use for the protection and safety of life and limb, limited only by the necessity for preserving the efficiency of the structure, machine or other apparatus or device, and with-

out regard to the additional cost of suitable material or safety appliance or device."

Hence, the question as to the **proper space** between electrical wires, for the safety of workmen, is a question of fact, and of fact only, to be decided by the jury, and by the jury only, under proper instructions, which the Court gave. It is not a question as to what **some** witness testified is the regular space, but it is for the **jury** to say, under the facts, what is the **proper** space.

It is true that Johnny Bisher knew and testified that the transmission wires were alive and carried 2300 volts, but that fact has nothing to do with this case, and even if it did, the testimony shows that he was an inexperienced boy, and that he was doing that work in the manner in which he was told to do that work by his superior.

"THE FAILURE TO SUPPLY RUBBER GLOVES." Page 99.

Under this head the Brief quotes from the testimony of Robert M. Betts, in which he testifies:

Q. Did you ask him, Bisher, if he wanted any rubber gloves, or needed any?

A. No, sir.

Q. You didn't?

A. No, sir.

And for such reason, and based on such testimony, it is claimed that the plaintiff in error was not negligent in his failure to supply rubber gloves, and yet, on page 321 of the Transcript of Record, this same witness, as to rubber gloves, testified:

Q. Did you have any?

A. No, sir.

Q. You did not have any?

A. No, sir, never have had any there.

Page 323:

Q. You are not an electrician yourself, are you?

A. No, I am not.

Q. Just common knowledge that told you that that was a precaution?

A. Yes, sir, I had heard that it was a precaution.

It is very apparent that counsel, in the preparation of their Brief, have taken excerpts of the testimony which would tend to support their theory of the case, and have carefully omitted anything which would tend to support our theory of the case, and they apparently assume there is no testimony in the record on behalf of the defendant in error.

On page 108 of their Brief they quote the testimony of one witness to the effect that "It is their option as to using them." And on the same page they also quote this testimony of the witness Kennedy for the plaintiff in the action:

Q. What is the custom of the average employer requiring linemen to use rubber gloves?

A. In the last three years they have all forced me to take rubber gloves or not work.

And yet, in the face of such testimony, they want to make it appear that the use of rubber gloves was a matter in the discretion of the workmen.

"AN ABSOLUTELY SAFE WAY KNOWN TO BISHER," page 116 of the Brief. Referring

to Bisher, it is said: "At the time he was hurt, there was a distance between the outer right hand wire and the middle wire of 30 inches, in which he could have placed his body and supported himself by holding on to the pole and the cross-arm, and been absolutely safe."

That is a statement of counsel, and counsel only, but it is no evidence that he would be safe in that or any other position on those poles while he was engaged in the **work** which he was employed to do.

"UNINSULATED TRANSMISSION WIRES,"
Page 118 of their Brief.

The statute made it the duty of the defendant to "Use every device, care and protection which it is practicable to use for the protection and safety of life and limb, etc.," and under this statute the Court gave very fair and liberal instructions for the defendant, and there was strong testimony on behalf of the plaintiff in the action tending to show that it was both feasible and practicable to insulate the wires; but, for the reason that the defendant in the action introduced some testimony tending to show that it was not feasible or practicable, counsel now claim that the verdict was against the instruction under the head of "SUFFICIENCY OF EVIDENCE," "POINTS AND AUTHORITIES," on page 149 of their Brief counsel make a summary of what the evidence fails to show and what the evidence does show. Such statements are all **assumptions** of counsel, and are in **conflict** with the **verdict** of the jury.

There is testimony in the record tending to prove the following facts:

I.

That Johnnie Bisher was a bright and intelligent boy, 18 years of age.

II.

That he was inexperienced in the construction or operation of power transmission lines.

III.

That he was in the employ of Robert M. Betts as receiver.

IV.

That while engaged in such employemnt, and doing such work as he was instructed to do, and while at the **place** where he was directed and authorized to be, and doing his work in the **manner** in which he was **directed** and **instructed** to do his work, sustained serious personal injuries.

V.

That the injuries were caused, without any fault or negligence on his part, by his coming in contact with an electric power transmission line charged with 2300 volts.

VI.

That such lines where he was at work were *not* insulated and were **not** strung at such a distance as to permit repairmen to freely engage in their work without danger of shock.

VII.

That he was not furnished with rubber gloves or

other safety devices which were practicable for the protection and safety of his life and limb, and that he sustained such injuries by reason of the failure of the plaintiff in error to use every device, care and precaution which it was practicable to use for the protection and safety of his life and limb, and that the wires were not strung at a sufficient distance to permit him to freely engage in his work without danger of shock, and by reason thereof he sustained the injuries of which he complains.

VIII.

That he was in the employ of Robert M. Betts as receiver, and that Robert M. Betts, as such receiver at the time of such injury, was in the possession and operation of the property where the injury occurred, and is liable to him as such receiver.

As stated, through their Brief, cousel for plaintiff in error have presented two questions, and two questions only, to be considered on this appeal:

First: That the trial court did not have jurisdiction of the defendant in the action.

Second: That there is no evidence to support the verdict of the jury.

The one is a question of law without any authority to sustain it. The other is a question of fact, and of fact only, and is not sustained by the record and is without merit. It is founded upon the assumption and the assumption only, of counsel that, because there is some testimony in the record which tends to prove the issues on behalf of the defendant

in the action, the Court must assume, as a matter of law, that the plaintiff in the action was not entitled to recover. On this appeal they ask this Court to ignore, and eliminate from the record, any and all the testimony tending to support the allegations of the complaint, and to set aside the verdict and grant a new trial because there is **some** testimony tending to support the theory of the defendant in the action; and it clearly appears from the brief of plaintiff in error that **such** are the reasons, and the **only** reasons, for this appeal, and a careful examination of the testimony, records and instructions will justify that statement.

There are no legal questions presented in the record. It is for such reasons, and such reasons only, and with all due respect to opposing counsel, that we have only cited two authorities. The only question involved on this appeal is a question of fact, and the judgment should be affirmed.

Respectfully submitted,

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